Study N-100 April 13, 1994

Memorandum 94-18

Administrative Adjudication: Proposed Restructuring of Statute

OUTLINE OF MEMORANDUM

BACKGROUND

The Commission circulated for comment its tentative recommendation for a comprehensive administrative adjudication statute during Summer 1993. The Commission began considering the comments received during Fall 1993, but this task was suspended during work on the SCA 3 priority project (trial court unification).

The Commission returned to consideration of comments on the tentative recommendation at its February 1994 meeting. At that time the Commission heard agency requests for exemption from the proposed statute. Among the concerns commonly expressed by agencies seeking exemption were:

— The draft statute is inappropriately structured for the agency, being based on an accusatory model rather than on a neutral model.

— The draft statute doesn't accommodate the informal nature of the agency's hearings.

— The draft statute doesn't accommodate the public participation required by statute or allowed by the agency.

— The draft statute would require the agency to adopt extensive regulations in order to modify provisions inappropriate to them. The net result will be that the agency would end up with basically the same procedure it uses now, only the scheme of regulations and statutes would be more complex than it is now and the time and expense required to end up there would be unwarranted.

In light of these concerns, the Commission decided to consider a substantial reorganization and recasting of the proposed statute that would make it more understandable and usable for the agencies. The staff's suggested restructuring of the draft statute is outlined below and attached to this memorandum.

Comments we have previously received on the procedural details of the draft statute, unaffected by any reorganization, are analyzed in Memorandum 94-19.

PROPOSED RESTRUCTURING

Organization of Statute

The proposed restructuring organizes the statute in a way that makes it more understandable and usable. The mainline statute remains Part 4 of the Administrative Procedure Act, as in the tentative recommendation. However, it is now redesignated as the "Formal Hearing" procedure.

A new Part 3, general provisions on "Adjudicative Proceedings", is added to the APA, preceding the formal hearing procedure. Part 3 makes clear that the APA is limited in its application to constitutionally and statutorily required hearings. Part 3 then catalogs the available procedures by which an agency may elect to conduct a hearing:

- The formal hearing procedure.
- The informal hearing procedure.
- An agency hearing procedure (the "template" approach).
- The emergency decision procedure.
- The declaratory decision procedure.

Each of these procedures, and its limitations, is elaborated in the succeeding articles or, in the case of the formal hearing procedure, in the succeeding Part.

Application of Statute

A critical aspect of the statute is its application. Many agencies are concerned that the draft would require an elaborate procedure for simple agency decisions that should not be encumbered or bogged down by the requirements of an administrative hearing.

The statute is intended to apply only to statutorily or constitutionally required "on the record" hearings, and not to the ordinary run of daily or mundane decisions an agency makes that could affect a person's rights or interests. The Commission has gone through several versions of the application section of the statute in an effort to clarify its scope.

The restructured statute contains the staff's latest attempt, done in consultation with Professor Asimow. It is set out in the draft as Section 631.010 — the first provision of Part 3, Adjudicative Proceedings:

> 631.030. This division governs a decision by an agency if, under the federal or state constitution or a statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.

This provision is followed by a lengthy comment elaborating its meaning. For example, its coverage parallels that of Code of Civil Procedure Section 1094.5, the administrative mandamus statute ("a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer"), and it does not extend the APA to *Skelly* hearings.

The staff believes that this is a reasonably good resolution of a difficult drafting problem, and suggests the Commission proceed with this provision.

Terminology

We have tried to make the mainline formal hearing statute more usable for most agencies by revising terminology that might have retained an accusatorial flavor from the old licensing enforcement provisions or implied that the agency always initiates action. Thus, for example, the "initial pleading" is renamed the "agency pleading", and the "responsive pleading" is renamed the "response". Definitions are revised to downplay accusation-type language, or are eliminated. Substantive provisions as to the contents of the pleadings are also phrased in a more neutral fashion.

The staff does not view the current revision as complete in this respect, and we are still examining the draft for other possible improvements of this type. For example, it may be helpful to redesignate the pleadings as "papers", to help mitigate the adversarial tone. The staff would welcome any suggestions for further terminological or other changes that would make the statute more easily usable for the wide variety of hearings that will fall under it.

Informal Hearing Procedure

The proposed conference hearing plays a critical role in the work the Commission has done on administrative adjudication — it provides an informal forum in which a hearing can be conducted without many of the formalities and legalistic trappings of the formal hearing procedure. It also provides a mechanism by which an agency can receive public input at the hearing, where appropriate, without intervention procedures. But the provisions are buried in the middle of the formal hearing procedure and are obscured by the "conference" terminology.

In the restructuring we have changed the name to "informal hearing procedure" and, in recognition of its importance, have elevated it to the front of the statute as one of the major hearing procedures available to an agency.

Template Approach

The most important change proposed in the restructured statute is the so-called "template" approach, which was discussed somewhat at the February meeting. The template approach should first be contrasted with the Commission's tentative recommendation.

The tentative recommendation provides a mainline statute that presumptively governs all state agency administrative hearings. However, because one size doesn't fit all, agencies are allowed to modify certain aspects of the mainline statute by regulation. The ability to opt out of some provisions is not available to agencies governed by the existing Administrative Procedure Act, in order not to introduce variation where uniformity now exists. Some agencies, whose hearings are sui generis, would be exempted from the draft statute altogether in response to exemption requests considered by the Commission at the February meeting.

The template approach turns this scheme on its head. Instead of providing a mainline statute with opt out provisions, the template approach allows an agency to adopt its own procedure, but the procedure must satisfy key mandatory due process and public policy requirements — the template. The agency could opt in to provisions of the mainline statute, which satisfy the due process and public policy requirements and provide a safe harbor. The mainline statute would continue to govern hearings now under the Administrative Procedure Act. The mainline statute would also be the default statute applicable to all other agency hearings unless the agency adopts its own procedures.

The key due process and public policy requirements that an agency's procedure would be required to satisfy are:

- Freedom of presiding officer from bias.
- Separation of functions within the agency.
- Public hearings.
- Language assistance for parties and witnesses (only applicable to certain agencies).
- Right to present and rebut evidence.
- Restriction of ex parte communications with presiding officer.
- Written decision based on the record, including a statement of the factual and legal basis of the decision.
- Designation and indexing of precedential decisions.

The draft also provides a simplified procedure by which the agency may adopt the necessary regulations.

The template approach satisfies a number of basic objectives of the Commission's administrative procedure project. Agency procedures will be established by statutes or regulations, and will be accessible to the public. Uniformity will be encouraged because the mainline statute will remain as the default procedure for agencies absent adoption of a complying agency procedure, and will provide standard due process and public policy structural provisions that will be incorporated in agency procedures.

In addition, the template approach has a number of advantages over the Commission's tentative recommendation. It simplifies an agency's procedural rules in cases where an agency needs to tailor its administrative procedure — the agency can have one simple set of regulations rather than the statute plus a set of modifying regulations. It simplifies an agency's task in preparing procedural rules — in many cases an agency's existing regulations will already satisfy the statutory requirements. The template approach also enables simplification of the mainline statute itself — the statute can set out basic rules without qualifying language throughout as to which provisions are modifiable and which are not.

The staff believes the template approach is a significant improvement over the tentative recommendation draft, both in terms of workability and in terms of marketability to the agencies that will be required to live with it. However, there are problems with the template approach that the Commission should be aware of.

Problems with Template Approach

Loss of Protections. One concern with the template approach is that agencies using it will not be subject to many of the protections built into the mainline statute. For example, the mainline statute provides discovery procedures, with privacy and abuse protections. Under the template approach, an agency could provide its own discovery procedures, without basic protections.

This problem is not created by the template approach. It is a feature of existing law, which provides minimal regulation for agency procedures not covered by the Administrative Procedure Act. It might be useful, however, to add a general provision to the effect that where a dispute arises under an agency's procedure that is not resolved by the law governing that procedure, the court may look to the mainline statute for guidance.

Compliance with Template Requirements. Another basic problem with the template approach is that it may not necessarily be clear whether an agency's regulations in fact satisfy the template. For example, the template requires limitations on ex parte communications. Is it sufficient that the agency's regulations limit ex parte communications during the hearing itself but not after the hearing pending issuance of a decision?

The approach we have taken in the current draft is to refer to the relevant due process and public policy provisions elaborated in the mainline statute. See Section 633.030 of the restructured statute (requirements of agency hearing procedure). We will need to review the mainline statute to make sure that the relevant due process and public policy provisions are not intermingled with other unimportant procedural details.

An agency could ensure that it satisfies the required template provisions simply by repeating or incorporating by reference the relevant provisions of the mainline statute. But if the agency decides to write its own provisions on the matter geared to its particular types of hearings, there may still be an issue whether the provisions satisfy the template requirement.

A person unhappy with an agency's decision in a particular case may challenge the agency's procedure on the grounds that the procedure does not satisfy the template requirements, thereby finding an additional ground for challenge not present under existing law. This is a troubling prospect to the staff. We can think of only a few reasonable solutions to the problem:

(1) If the agency's regulations are reviewed by OAL and are determined to comply with the template, the regulations could then be presumptively or

conclusively presumed to satisfy the template. Or a substantial burden of proof could be imposed on any challenge, if the regulations had been through this review process.

(2) An agency could simply incorporate the mainline statute provisions and not attempt to craft its own provisions on matters subject to the template.

(3) The template requirements could be phrased in a looser way so that an agency can easily satisfy them. For example, the statute could require simply that an agency's procedure contain provisions relating to freedom of the presiding officer from bias, leaving it to the agency to determine what that means in the context of its own hearings.

(4) With regard to the requirement of separation of functions, an agency that is a neutral decision maker and not a party to the proceeding could be excused from the need to adopt separation of functions provisions as part of its procedure.

COMMISSION ACTION

Our objective at this point in the project is to develop a final recommendation for submission to the 1995 legislative session. Our hope is to wrap up work on it before November 1994, when we will probably have to turn our attention full time again to SCA 3 (trial court unification). In addition, Senator Boatwright has suggested that interim legislative hearings on the proposal would be helpful. For this purpose we would need to complete work well before November.

The Commission must determine whether the basic restructuring outlined above is the approach it wishes to follow in developing its final recommendation on administrative adjudication. If so, we must begin immediately with a close review of the draft. We have only three meetings left after the May meeting in which to finalize work on the recommendation — July, September, and November. The staff believes it is feasible to accomplish a final draft of the Administrative Procedure Act within that time.

However, the conforming revisions in other agency statutes will present a formidable challenge. We have done a substantial amount of staff work on the conforming revisions, but there is substantial work yet to be done and there are a number of significant policy decisions for Commission resolution. The conforming revisions can trail the main statute somewhat, particularly with a delayed operative date. But the Commission should be aware that if indeed the

Commission becomes entrenched in SCA 3 implementation, it may be difficult to find time to consider the conforming revisions and the Commission may need to schedule extra sessions devoted to this task.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

ADMINISTRATIVE PROCEDURE ACT

OUTLINE

SECTION 1. Division 3.3 (commencing with Section 600) is added to Title 1 of the Government Code, to read:

DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

PART 1. GENERAL PROVISIONS

CHAPTER 1. PRELIMINARY PROVISIONS

Article 1. Short Title

§ 600. Short title

600. (a) This division, and Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, constitute and may be cited as the Administrative Procedure Act.

(b) A reference in any other statute or in a rule of court, executive order, or regulation to a provision of Chapter 4 (commencing with Section 11370) or Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 means the applicable provision of this division.

Comment. Section 600 restates a portion of former Section 11370. A reference in another statute or in a regulation to the rulemaking provisions of the Administrative Procedure Act continues to refer to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2. This division, as currently drafted, applies only to the administrative adjudication portion of the Administrative Procedure Act. When the division is expanded to include rulemaking, the general provisions will be reviewed for applicability.

References in section Comments in this division to the "1981 Model State APA" mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws, and to the "Federal APA" mean the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06, 1305, 3344, 5362, 7521 (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237), from which a number of the provisions of this division are drawn.

Article 2. Definitions

§ 610.010. Application of definitions

610.010. (a) Unless the provision or context requires otherwise, the definitions in this article govern the construction of this division.

(b) The definitions in this article apply to grammatical variants of the terms defined.

Comment. Subdivision (a) of Section 610.010 restates the introductory portion of former Section 11500.

Subdivision (b) is new. Under subdivision (b), for example, the definition of the term "license" in Section 610.360 to include "certificate" would extend, mutatis mutandis, to variant forms such as "licensed", "licensee", and "licensing" ("certificated", "certificate holder", and "certificate issuance").

§ 610.190. Agency

610.190. "Agency" means a board, bureau, commission, department, division, office, officer, or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head. To the extent it purports to exercise authority pursuant to any provision of this division, an administrative unit otherwise qualifying as an agency shall be treated as a separate agency even if the unit is located within or subordinate to another agency.

Comment. Section 610.190 supersedes Section 11000 and former Section 11500(a). It is drawn from 1981 Model State APA § 1-102(1). The intent of the definition is to subject as many governmental units as possible to the provisions of this division. The definition explicitly includes the agency head and those others who act for an agency, so as to effect the broadest possible coverage. The definition also would include a committee or council.

The last sentence of the section is in part derived from Federal APA § 551(1), treating as an agency "each authority of the Government of the United States, whether or not it is within or subject to review by another agency". A similar provision is desirable here to avoid difficulty in ascertaining which is *the* agency in a situation where an administrative unit is within or subject to the jurisdiction of another administrative unit.

It should be noted that an administrative unit of an agency that has no authority to issue decisions or take other action on behalf of the agency would not be an "agency" within the meaning of this section.

§ 610.250. Agency head

610.250. "Agency head" means a person or body in which the ultimate legal authority of an agency is vested, and includes a person or body to which the power to act is delegated pursuant to authority to delegate the agency's power to hear and decide.

Comment. The first portion of Section 610.250 is drawn from 1981 Model State APA § 1-102(3). The definition of agency head is included to differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular persons in which the final legal authority over its operations is vested.

The last portion is drawn from former Section 11500(a), relating to use of the term "agency itself" to refer to a nondelegable power to act. An agency may delegate the power of the agency head to review a proposed decision in an administrative adjudication. Section 649.210 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

§ 610.280. Agency member

610.280. "Agency member" means a member of the body that constitutes the agency head and includes a person who alone constitutes the agency head.

Comment. Section 610.280 restates former Section 11500(e) ("agency member" defined).

§ 610.290. Agency pleading

610.290. "Agency pleading" means an agency action that commences an adjudicative proceeding, whether in the form of a statement of issues, initial determination, accusation, or otherwise.

Comment. Section 610.290 supersedes former Section 11504.5 and portions of the first sentences of former Sections 11503 and 11504.

§ 610.310. Decision

610.310. (a) "Decision" means an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person.

(b) Nothing in this section limits:

(1) The authority of an agency to make a declaratory decision pursuant to Chapter 5 (commencing with Section 635.060) of Part 3.

(2) The precedential effect of a decision under Article 3 (commencing with Section 649.310) of Chapter 9 of Part 4.

Comment. Section 610.310 is drawn from 1981 Model State APA § 1-102(5). The definition of "decision" makes clear that it includes only legal determinations made by an agency that are of specific applicability because they are addressed to particular or named persons. More than one identified person may be the subject of a decision. Section 13 (singular includes plural). "Person" includes legal entity and governmental subdivision. Section 610.520 ("person" defined); see also Section 17.

A decision includes every agency action that determines any of the legal rights, duties, privileges, or immunities of a specific identified individual or individuals. This is to be compared to a regulation, which is an agency action of general application, that is, applicable to all members of a described class. Sections 610.660 and 11342 ("regulation" defined). The primary operative effect of the definition of decision is in Parts 3 (commencing with Section 631.010) and 4 (commencing with Section 641.110), governing adjudicative proceedings. This section is not intended to expand the types of cases in which an adjudicative proceeding is required; an adjudicative proceeding under this division is required only where another statute or the constitution requires one. Section 631.010 (application to constitutionally and statutorily required hearings).

Consistent with the definition in this section, rate making and licensing determinations of specific application, addressed to named or particular parties such as a certain power company or a certain licensee, are decisions subject to the adjudication provisions of this statute. *Cf.* Federal APA § 551(4), defining all rate making as rulemaking. On the other hand, rate making and licensing actions of general application, addressed to all members of a described class of providers or licensees, are regulations under this statute. See the Comment to Section 610.660. However, some decisions may have precedential effect pursuant to Sections 649.310-649.340 (precedent decisions).

§ 610.360. License

610.360. "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.

Comment. Section 610.360 is drawn from 1981 Model State APA § 1-102(4).

§ 610.370. Local agency

610.370. "Local agency" means a county, city, district, public authority, public agency, or other political subdivision or public corporation in the State of California other than the state.

Comment. Section 610.370 is new. Local agencies are not governed by this division, subject to exceptions. See Section 612.120 (application of division to local agencies) [and judicial review provisions]. See also Section 610.770 ("state" defined).

§ 610.460. Party

610.460. "Party", in an adjudicative proceeding, includes the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to intervene in the proceeding.

Comment. Section 610.460 restates former Section 11500(b); see also 1981 Model State APA § 1-102(6). "Person" includes legal entity and governmental subdivision. Section 610.520 ("person" defined); see also Section 17.

Under this definition, if an officer or employee of an agency appears in an official capacity, the agency and not the person is a party. A staff division authorized to act on behalf of the agency may be a party under this division. See Section 610.190 and Comment ("agency" defined).

For provisions on intervention, see Sections 644.110-644.150.

This section is not intended to address the question whether a person is entitled to judicial review. Standing to seek judicial review is dealt with in other law.

§ 610.520. Person

610.520. "Person" includes an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character.

Comment. Section 610.520 supplements the definition of "person" in Section 17. It is drawn from 1981 Model State APA § 1-102(8). It would include the trustee of a trust or other fiduciary.

The definition is broader than Section 17 in its application to a governmental subdivision or unit; this would include an agency other than the agency against which rights under this division are asserted by the person. Inclusion of such agencies and units of government insures, therefore, that other agencies or other governmental bodies can, for example, petition an agency for the adoption of a regulation, and will be accorded all the other rights that a person will have under the division.

§ 610.660. Regulation

610.660. "Regulation" has the meaning provided in Section 11342.

Comment. Section 610.660 incorporates the definition of "regulation" found in the rulemaking provisions of the Administrative Procedure Act. Subdivision (b) of Section 11342 provides:

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency. "Regulation" does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

§ 610.680. Reviewing authority

610.680. "Reviewing authority" means the agency head and includes the person or body to which the agency head has delegated its review authority pursuant to Section 649.210 (availability and scope of review).

Comment. Section 610.680 is new. It is intended for drafting convenience.

§ 610.770. State

610.770. "State" means the State of California and includes any agency or instrumentality of the State of California, whether in the executive department or otherwise.

Comment. Section 610.770 supplements Section 18 ("state" defined). This division applies to state agencies other than the Legislature, the courts and judicial branch, the Governor and Governor's office, and the University of California. See Section 612.110 (application of division to state) and Comment; see also Section 610.190 ("agency" defined). It does not apply to local agencies. See Section 612.120 (application of division to local agencies); see also Section 610.370 ("local agency" defined).

Article 3. Transitional Provisions

§ 610.910. Operative date

610.910. This division becomes operative on July 1, 1997.

Comment. Section 610.910 provides a year and a half deferred operative date to enable agencies to adopt any necessary regulations.

§ 610.920. Pending proceedings

610.920. Subject to Section 610.930, an adjudicative proceeding commenced before the operative date of this division is governed by the applicable law in effect at the time of commencement of the adjudicative proceeding and not by this division.

Comment. Section 610.920 speaks in terms of commencement of a proceeding. A proceeding is considered commenced for purposes of this division on issuance of an agency pleading. Section 642.310; see also Section 610.290 ("agency pleading" defined).

§ 610.930. Commencement or remand after operative date

610.930. (a) An adjudicative proceeding commenced on or after the operative date of this division is governed by this division.

(b) An adjudicative proceeding conducted on a remand from a court or another agency after the operative date of this division is governed by this division.

Comment. Subdivision (b) of Section 610.930 is an exception to the rule of 610.920 (proceeding commenced before operative date governed by prior law).

§ 610.940. Adoption of regulations

610.940. (a) Notwithstanding Section 610.910, before, on, or after the operative date of this division an agency may adopt interim or permanent regulations to govern an adjudicative proceeding under this division.

(b) Subject to Section 11351:

(1) Interim regulations need not comply with the Article 5 (commencing with Section 11346) or Article 6 (commencing with Section 11349) of Chapter 3.5 of Part 1 of Division 3 of Title 2, but are governed by Chapter 3.5 in all other respects.

(2) Interim regulations expire on December 31, 1998, unless earlier terminated or replaced by or readopted as permanent regulations in compliance with Articles 5 (commencing with Section 11346) and 6 (commencing with Section 11349) and all other provisions of Chapter 3.5 of Part 1 of Division 3 of Title 2.

Comment. Subdivision (a) of Section 610.940 makes clear that an agency may act to adopt regulations under this division after enactment but before the division becomes operative. This will enable the agency to have any necessary regulations in place on the operative date.

Under subdivision (b), an agency may adopt interim procedural regulations without the normal notice and hearing and Office of Administrative Law review processes of the Administrative Procedure Act. However, this does not excuse compliance with the other provisions of the Administrative Procedure Act, including but not limited to the requirements that (1) regulations be consistent and not in conflict with statute and reasonably necessary to effectuate the purpose of the statute (Section 11342.2), (2) regulations be filed and published (Sections 11343-11344), and (3) regulations are subject to judicial review (Section 11350). Compliance with these provisions is not required for agencies exempted by statute. See Section 11351 (exemption of Public Utilities Commission, Division of Industrial Accidents, and Workers' Compensation Appeals Board).

Interim regulations are only valid up to 18 months, through December 31, 1998. They may be replaced by or readopted as permanent regulations before then, through the standard administrative rulemaking process.

CHAPTER 2. APPLICATION OF DIVISION

§ 612.110. Application of division to state

612.110. Except as otherwise expressly provided by statute:

(a) This division applies to all agencies of the state.

(b) This division does not apply to the Legislature, the courts or judicial branch, or the Governor or office of the Governor.

(c) This division does not apply to the University of California.

Comment. Section 612.110 supersedes former Section 11501. Whereas former law specified agencies subject to the Administrative Procedure Act, Section 612.110 reverses this statutory scheme and applies this division to all state agencies unless specifically excepted. The intent of this statute is to subject as many state governmental units as possible to the provisions of this division.

Subdivision (a) is drawn from 1981 Model State APA § 1-103(a).

Subdivision (b) supersedes Section 11342(a). It is drawn from 1981 Model State APA § 1-102(1). Note that exemptions from the division are to be construed narrowly.

Subdivision (b) exempts the entire judicial branch, and is not limited to the courts. Judicial branch agencies include the Judicial Council, the Commission on Judicial Appointments, the Commission on Judicial Performance, and the Judicial Criminal Justice Planning Committee.

Subdivision (b) exempts the Governor's office, and is not limited to the Governor. For an express statutory exception to the Governor's exemption from this division, see Bus. & Prof. Code § 106.5 ("The proceedings for removal [by the Governor of a board member in the Department of Consumer Affairs] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.")

Subdivision (c) recognizes that the University of California enjoys a constitutional exemption. See Cal. Const. Art. 9, § 9 (University of California a public trust with full powers of government, free of legislative control, and independent in administration of its affairs).

Nothing in this section precludes the University of California or any other exempt agency of the state from electing to be governed by this division. See Section 612.130.

§ 612.120. Application of division to local agencies

612.120. (a) This division does not apply to a local agency except to the extent this division is made applicable by statute.

(b) This division applies to an agency created or appointed by joint or concerted action of the state and one or more local agencies.

Comment. Section 612.120 is drawn from 1981 Model State APA § 1-102(1). See also Section 610.370 ("local agency" defined). Local agencies are excluded because of the very different circumstances of local government units when compared to state agencies. The section explicitly includes joint state and local bodies, so as to effect the broadest possible coverage.

This division is made applicable by statute to local agencies in a number of instances, including:

Suspension or dismissal of permanent employee by school district. Ed. Code § 44944.

Nonreemployment of probationary employee by school district. Ed. Code § 44948.5.

Evaluation, dismissal, and imposition of penalties on certificated personnel by community college district. Ed. Code § 87679.

§ 612.130. Election to apply division

612.130. Notwithstanding any other provision of this chapter, by regulation, ordinance, or other appropriate action an agency may adopt this division or any of its provisions for the formulation and issuance of a decision, even though the agency or decision is exempt from application of this division.

Comment. Section 612.130 is new. An agency may elect to apply this division even though the agency would otherwise be exempt (Sections 612.110 (application of division to state) and 612.120 (application of division to local agencies)) or the particular action taken by the agency would otherwise be exempt (Section 631.010 (application to constitutionally and statutorily required hearings)).

§ 612.140. Contrary express statute controls

612.140. Notwithstanding any other provision of this division, a statute applicable to a particular agency or proceeding prevails over a contrary provision of this division.

Comment. Section 612.140 makes clear that the general provisions of the Administrative Procedure Act are not intended to override contrary express statutes.

§ 612.150. Suspension of statute when necessary to avoid loss or delay of federal funds or services

612.150. (a) To the extent necessary to avoid a loss or delay of funds or services from the United States that would otherwise be available to the state, by executive order the Governor may:

(1) Suspend, in whole or in part, any provision of this division.

(2) Adopt a rule of procedure that will avoid the loss or delay.

(b) The Governor shall declare the termination of an executive order issued under this section as soon as it is no longer necessary to prevent the loss or delay of funds or services from the United States.

(c) If a provision of this division is suspended or rule of procedure adopted pursuant to this section, the Governor shall promptly report the suspension or adoption to the Legislature. The report shall include recommendations concerning any desirable legislation that may be necessary to conform this division to federal law.

Comment. Section 612.150 is drawn from 1981 Model State APA § 1-104. *Cf.* Section 8571 (power of Governor to suspend statute in emergency). It is expanded to extend to a delay in receipt as well as to a loss of federal funds, and actions that may be taken include provision of an alternate procedure as well as suspension of an existing procedure.

This section permits specific functions of agencies to be exempted from applicable provisions of this division only to the extent that is necessary to prevent the loss or delay of federal funds or services. The test to be met is simply whether, as a matter of fact, there will actually be a loss or delay of federal funds or services if there is no suspension or adoption of an alternate procedure. And the suspension or adoption is effective only so long as and to the extent necessary to avoid the contemplated loss or delay.

The Governor is not required to issue an executive order merely on the receipt of a federal agency certification that a suspension or adoption of an alternate procedure is necessary. The suspension or adoption must be actually necessary. That is, the Governor must first decide that the federal agency is correct in its assertion that federal funds may *lawfully* be delayed or withheld from the state agency if that agency complies with certain provisions of this division, and that the federal agency intends to exercise its authority to withhold or delay those funds if certain provisions of this division are followed. However, if these two requirements are met, the Governor may suspend the provision or adopt an alternate procedure.

§ 612.160. Waiver of provisions

612.160. Except to the extent precluded by another statute or regulation, a person may waive a right conferred on the person by this division.

Comment. Section 612.160 is drawn from 1981 Model State APA § 1-105. It embodies the standard notion of waiver, which requires an intentional relinquishment of a known right. A right under this division is subject to waiver in the same way that a right under any other civil statute is normally subject to waiver. Although a right may be waived by inaction, a written waiver is ordinarily preferable. This section applies to all affected persons, whether or not parties.

CHAPTER 3. PROCEDURAL PROVISIONS

Article 1. Miscellaneous Provisions

§ 613.110. Voting by agency member

613.110. Agency members qualified to vote on a matter may vote by mail or otherwise, without being present at a meeting of the agency.

Comment. Section 613.110 restates and broadens former Section 11526 to allow telephonic or other appropriate means of voting. An agency member is not qualified to vote as a presiding officer in an adjudicative proceeding if the agency member did not hear the evidence. Section 643.110(d)(3). This section is subject to a contrary statute applicable to an

agency or proceeding. Section 612.140 (contrary express statute controls). See, e.g., Water Code Section 183 (State Water Board in person vote).

It should be noted that under the Open Meeting Law deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session. Section 11126(d). See also Section 610.280 ("agency member" defined).

§ 613.120. Oaths, affirmations, and certification of official acts

613.120. In a proceeding under this division an agency, agency member, chief executive officer of an agency, hearing reporter, or presiding officer has power to administer oaths and affirmations and to certify to official acts.

Comment. Section 613.120 restates former Section 11528.

Article 2. Notice

§ 613.210. Service

613.210. (a) If this division requires that an order or other writing be served on or notice given to a person, the writing or notice shall be delivered personally or sent by mail or other means pursuant to Section 613.220 to the person at the person's last known address or, if the person is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative.

(b) For the purpose of this section, if a party is required by statute or regulation to maintain an address with the agency that is sending the order or other writing, the party's last known address is the address maintained with the agency.

Comment. Section 613.210 is intended for drafting convenience. It supersedes a provision of former Section 11517(b). For provisions applicable to authorized representatives, see Sections 613.310-613.340 (representation of parties).

§ 613.220. Mail or other delivery

613.220. Unless a provision specifies the form of mail, service or notice by mail under this division may be by first class mail, registered mail, or certified mail, by mail delivery service, by facsimile transmission if complete and without error, or by other electronic means as provided by regulation, in the discretion of the sender.

Comment. Section 613.220 supersedes various provisions of former law. See, e.g., former Section 11518 (decision sent by registered mail). Failure of a person to receive notice of a hearing sent under this section is prima facie evidence of good cause for failure to attend the hearing under the formal hearing procedure. Section 648.130(c) (default).

Proof of service may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ. Proc. § 1013a; Cal. Rules Ct., R. 2008 (e) (proof of service by facsimile transmission).

§ 613.230. Extension of time

613.230. (a) Service or notice pursuant to Section 613.220 extends any prescribed period of notice, and any right or duty to do an act or make a response within a prescribed period after service or notice, by the following times:

(1) Five days, if service or notice is by mail or mail delivery service,

(2) Two days, if service or notice is by facsimile transmission or other electronic means.

(b) This section applies to a period prescribed by this division or by regulation under this division.

Comment. Section 613.230 is drawn from the statutes relating to service of notice by mail within California and from parallel provisions of the California Rules of Court. See Cal. R. Ct., Rule 2008(b); Code Civ. Proc. § 1013(e). This reverses existing law as to some administrative procedures. See, e.g., Camper v. Workers' Compensation Appeals Board, 12 Cal. Rptr. 2d 101 (1992); Southwest Airlines v. Workers' Compensation Appeals Board, 234 Cal. App. 3d 1421 (1991).

Article 3. Representation of Parties

§ 613.310. Self representation

613.310. A party may represent itself without an attorney. In the case of a party that is an entity, the entity may select any of its members to represent it and is bound by the acts of its authorized representative.

Comment. Section 613.310 generalizes a provision of former Section 11509.

§ 613.320. Representation by attorney

613.320. A party may be represented by an attorney at the party's own expense. A party is not entitled to appointment of an attorney to represent the party at public expense.

Comment. Section 613.320 generalizes a provision of former Sections 11500(f)(3) and 11509. Qualification and discipline of attorneys that practice before administrative agencies is governed by the State Bar of California and not by the agencies. It should be noted, however, that an agency may seek the contempt sanction for misconduct by a participant in a hearing and may impose monetary sanctions on a party or attorney for bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. Sections 648.610 to 648.630 (enforcement of orders and sanctions).

§ 613.330. Lay representation

613.330. (a) An agency may permit a party to be represented by a person not otherwise authorized under this article.

(b) An agency may adopt regulations that impose qualification and disciplinary standards for representation under this section.

Comment. Subdivision (a) of Section 613.330 recognizes the practice of some agencies to permit lay representation. See, e.g., Labor Code § 5700 (Workers Compensation Appeals Board); Unemp. Ins. Code § 1957 (Unemployment Insurance Appeals Board); 18 CCR § 5056 (State Board of Equalization).

Under subdivision (b) an agency may regulate such matters as standards of competency and character for lay representatives, standards of conduct (including confidentiality) and disciplinary control, and procedures to bar representatives guilty of violating the standards from future representation before the agency.

§ 613.340. Authority of attorney or other representative of party

613.340. Unless the provision or context requires otherwise, any act required or permitted by this division to be performed by, and any notice required or permitted by this division to be given to, a party may be performed by, or given to, the attorney or other authorized representative of the party.

Comment. Section 613.340 is intended for drafting convenience. *Cf.* Code Civ. Proc. §§ 283, 446, 465, 1010, 1014 (authority of party or attorney in civil actions and proceedings). The section recognizes that an administrative proceeding may involve a non-attorney authorized representative of a party. Section 613.330.

CHAPTER 4. CONVERSION OF PROCEEDING

§ 614.010. Conversion authorized

614.010. (a) Subject to any applicable regulation adopted under Section 614.050, at any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding:

(1) May convert the proceeding to another type of agency proceeding provided for by the Administrative Procedure Act if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party.

(2) Shall convert the proceeding to another type of agency proceeding provided for by the Administrative Procedure Act, if required by regulation or statute.

(b) A proceeding of one type may be converted to a proceeding of another type only on notice to all parties to the original proceeding.

Comment. Section 614.010 is drawn from 1981 Model State APA § 1-107(a)-(b). A reference in this section to a "party", in the case of an adjudicative proceeding means "party" as defined in Section 610.460, and in the case of a rulemaking proceeding means an active participant in the proceeding or one primarily interested in its outcome. A reference to a proceeding provided by the Administrative Procedure Act includes a rulemaking proceeding as well as an adjudicative proceeding. Section 600. The conversion provisions may be irrelevant to some types of proceedings by some agencies, and in that case this chapter would be inapplicable.

Under subdivision (a)(1), a proceeding may not be converted to another type that would be inappropriate for the action being taken. For example, if an agency elects to conduct a formal hearing in a case where it could have elected an informal hearing initially, a subsequent decision to convert to an informal hearing would be appropriate under subdivision (a)(1).

The further limitation in subdivision (a)(1) that the conversion may not substantially prejudice the rights of a party must also be satisfied. The courts will have to decide on a case-by-case basis what constitutes substantial prejudice. The concept includes both the right to an appropriate procedure that enables a party to protect its interests, and freedom of the party from great inconvenience caused by the conversion in terms of time, cost, availability of witnesses, necessity of continuances and other delays, and other practical consequences of the conversion. Of course, even if the rights of a party are substantially prejudiced by a conversion, the party may voluntarily waive them.

It should be noted that the substantial prejudice to the rights of a party limitation on discretionary conversion of an agency proceeding from one type to another is not intended to disturb an existing body of law. In certain situations an agency may lawfully deny an individual an adjudicative proceeding to which the individual otherwise would be entitled by

conducting a rulemaking proceeding that determines for an entire class an issue that otherwise would be the subject of a necessary adjudicative proceeding. See Note, *The Use of Agency Rule-making to Deny Adjudications Apparently Required by Statute*, 54 Iowa L. Rev. 1086 (1969). Similarly, the substantial prejudice limitation is not intended to disturb the existing body of law allowing an agency, in certain situations, to make a determination through an adjudicative proceeding that has the effect of denying a person an opportunity the person might otherwise be afforded if a rulemaking proceeding were used instead.

Subdivision (a)(2) makes clear that an agency must convert a proceeding of one type to a proceeding of another type when required by regulation or statute, even if a nonconsenting party is greatly prejudiced thereby. Under subdivision (b), however, both a discretionary and a mandatory conversion must be accompanied by notice to all parties to the original proceeding so that they will have a fully adequate opportunity to protect their interests.

Within the limits of this section, an agency should be authorized to use those procedures in a proceeding that are most likely to be effective and efficient under the particular circumstances. Subdivision (a) allows an agency that desirable flexibility. For example, an agency that wants to convert a formal hearing into an informal hearing, or an informal hearing into a formal hearing, may do so under this provision if the conversion is appropriate, in the public interest, adequate notice is given, and the rights of no party are substantially prejudiced.

Similarly, an agency called on to explore a new area of law in a declaratory decision proceeding may prefer to do so by rulemaking. That is, the agency may decide to have full public participation in developing its policy in the area and to declare law of general applicability instead of issuing a determination of only particular applicability at the request of a specific party in a more limited proceeding. So long as all of the standards in this section are met, this section would authorize such a conversion from one type of agency proceeding to another.

While it is unlikely that a conversion consistent with all of the statutory standards could occur more than once in the course of a proceeding, the possibility of multiple conversions in the course of a particular proceeding is left open by the statutory language. In an adjudication, the prehearing conference could be used to choose the most appropriate form of proceeding at the outset, thereby diminishing the likelihood of a later conversion.

See also Section 613.230 (extension of time).

§ 614.020. Presiding officer

614.020. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, the officer or official shall secure the appointment of a successor to preside over or be responsible for the new proceeding.

Comment. Section 614.020 is drawn from 1981 Model State APA § 1-107(c). It deals with the mechanics of transition from one type of proceeding to another.

§ 614.030. Agency record

614.030. To the extent practicable and consistent with the rights of parties and the requirements of this division relating to the new proceeding, the record of the original agency proceeding shall be used in the new agency proceeding.

Comment. Section 614.030 is drawn from 1981 Model State APA § 1-107(d). It seeks to avoid unnecessary duplication of proceedings by requiring the use of as much of the agency record in the first proceeding as is possible in the second proceeding, consistent with the rights of the parties and the requirements of the Administrative Procedure Act.

§ 614.040. Procedure after conversion

614.040. After a proceeding is converted from one type to another, the presiding officer or other agency official responsible for the new proceeding shall do all of the following:

(a) Give additional notice to parties or other persons necessary to satisfy the requirements of the Administrative Procedure Act relating to the new proceeding.

(b) Dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the requirements of the Administrative Procedure Act relating to the new proceeding.

(c) Conduct or cause to be conducted any additional proceedings necessary to satisfy the requirements of the Administrative Procedure Act relating to the new proceeding.

Comment. Section 614.040 is drawn from 1981 Model State APA § 1-107(e). See also Section 613.230 (extension of time).

§ 614.050. Agency regulations

614.050. An agency may adopt regulations to govern the conversion of one type of proceeding to another. The regulations may include an enumeration of the factors to be considered in determining whether and under what circumstances one type of proceeding will be converted to another.

Comment. Section 614.050 is drawn from 1981 Model State APA § 1-107(f). Adoption of regulations is permissive, rather than mandatory.

PART 2. [RESERVED]

PART 3. ADJUDICATIVE PROCEEDINGS

CHAPTER 1. APPLICABLE HEARING PROCEDURE

§ 631.010 Application to constitutionally and statutorily required hearings

631.010 This division governs a decision by an agency if, under the federal or state constitution or a statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.

Comment. Section 631.010 limits application of the adjudicative proceedings provisions of this division to constitutionally and statutorily required hearings of state agencies. See Section 612.110 (application of division to state). It does not govern local agency hearings except to the extent expressly made applicable by another statute. Section 612.120 (application of division to local agencies).

Section 631.010 states the general principle that an agency must conduct an appropriate adjudicative proceeding before issuing a decision where a statute or the due process clause of the federal or state constitutions necessitates an evidentiary hearing for determination of facts. Such a hearing is a process in which a neutral decision maker makes a decision based exclusively on evidence contained in a record made at the hearing or on matters officially noticed. The hearing must at least permit a party to introduce evidence, make an argument to the presiding officer, and rebut opposing evidence.

The coverage of this division is the same as coverage by the existing provision for administrative mandamus under Code of Civil Procedure §1094.5(a). That section applies only where an agency has issued a final order "as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." Numerous cases have applied Code of Civil Procedure Section 1094.5(a) broadly to administrative proceedings in which a statute requires an "administrative appeal" or some other functional equivalent of an evidentiary hearing for determination of facts — an on-the-record or trial-type hearing. See, e.g., Eureka Teachers Ass'n v. Bd. of Educ., 199 Cal.App.3d 353, 244 Cal.Rptr. 240 (1988) (teacher's right to appeal a grade change was a right to hearing — Code Civ. Proc. § 1094.5 applies); Chavez v. Civil Serv. Comm'n, 86 Cal.App.3d 324, 150 Cal.Rptr. 197 (right of "appeal" means required hearing — Code Civ. Proc. § 1094.5 available).

In many cases, statutes or the constitution call for administrative proceedings that do not rise to the level of an evidentiary hearing as defined in this section. For example, the constitution or a statute might require only a consultation or a decision that is not based on an exclusive record or a purely written procedure or an opportunity for the general public to make statements. In some cases, the agency has discretion to provide or not provide the procedure. This division does not apply in such cases. Examples of cases in which the required procedure does not meet the standard of an evidentiary hearing for determination of facts are: Goss v. Lopez, 419 U.S. 565 (1975) (informal consultation between student and disciplinarian before brief suspension from school); Hewitt v. Helms, 459 U.S. 460 (1983) (informal nonadversary review of decision to place prisoner in administrative segregation — prisoner has right to file written statement); Skelly v. State Personnel Bd., 15 Cal.3d 194, 124 Cal.Rptr. 14 (1975) (informal opportunity for employee to respond orally or in writing to charges of misconduct prior to removal from government job); Wasko v. Dep't of Corrections, 211 Cal.App.3d 996, 1001-02, 259 Cal.Rptr. 764 (1989) (prisoner's right to appeal decision does not require a hearing — Code Civ. Proc. § 1094.5 inapplicable); Marina County Water Dist. v. State Water Res. Control Bd., 163 Cal.App.3d 132, 209 Cal.Rptr. 212 (1984) (hearing discretionary, not mandatory — Code Civ. Proc. § 1094.5 inapplicable).

This section applies only to proceedings for issuing a "decision." A decision is an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person. Section 610.310(a) ("decision" defined). Therefore this section does not apply to agency actions that do not determine a person's legal interests nor to rulemaking which is agency action of general applicability.

This division does not apply where agency regulations, rather than a statute or the constitution, call for a hearing. Agencies are encouraged to provide procedural protections by regulation even though not required to do so by statute or the constitution. An agency may elect to have the hearing governed by this division. See Section 612.130 (election to apply division).

This section does not specify what type of administrative proceeding should be conducted. If an adjudicative proceeding is required by this section, the proceeding may be a formal hearing, an informal hearing, an agency hearing, an emergency decision, or a declaratory decision in accordance with other provisions of this division. Under this division, the formal hearing procedure is standard unless circumstances permit the informal hearing or emergency decision. The formal hearing is analogous to the "adjudicatory hearing" under the former Administrative Procedure Act. Former Section 11500(f). The other procedures are new.

This section does not preclude the waiver of any procedure, or the settlement of any case without use of all available proceedings, under the general waiver and settlement provisions of Sections 612.160 (waiver of provisions) and 631.030(b) (when adjudicative proceeding not required).

§ 631.020. Applicable procedure

631.020. (a) An agency shall conduct an adjudicative proceeding for formulation and issuance of a decision governed by this division pursuant to one of the following procedures:

(1) The formal hearing procedure. The formal hearing procedure is provided in Part 4 (commencing with Section 640.010).

(2) The informal hearing procedure. The informal hearing procedure is provided in Chapter 2 (commencing with Section 632.010).

(3) An agency hearing procedure. Agency hearing procedures are authorized in Chapter 3 (commencing with Section 633.010).

(4) The emergency decision procedure. The emergency decision procedure is provided in Chapter 4 (commencing with Section 634.010).

(5) The declaratory decision procedure. The declaratory decision procedure is provided in Chapter 5 (commencing with Section 635.010).

(b) The agency may select the procedure that governs the adjudicative proceeding, subject to any limitations applicable to that procedure.

(c) Nothing in this section limits the authority to convert an adjudicative proceeding under this division to another type of proceeding under this division pursuant to Chapter 4 (commencing with Section 614.010) of Part 1.

Comment. Section 631.020 lists the types of hearing procedures available to an agency in a case where an evidentiary hearing for determination of facts is required for formulation and issuance of the decision. The agency may use any of the available procedures, provided the requirements for use of the particular procedure are satisfied.

The formal hearing procedure is always available. It is elaborated in Part 4. The formal hearing procedure is the default hearing procedure under this division, unless one of the alternatives provided for in this part is applicable. Section 641.110 (application of part).

The informal hearing procedure is available in smaller cases and in cases where there is no disputed issue of material fact. An agency may make the informal hearing procedure applicable in other cases as well, to the extent constitutional and other statutory limitations do not preclude it. Section 632.020 (when informal hearing may be used).

An agency hearing procedure is available in an adjudicative proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 633.020 (decisions for which agency hearing procedure authorized). The agency hearing procedure is governed by agency regulation, but must satisfy basic due process and public policy requirements. Section 633.030 (requirements of agency hearing procedure).

The emergency decision procedure is available where there is an immediate danger to the public health, safety, or welfare. Section 634.020 (when emergency decision available).

The declaratory decision procedure is an inexpensive means to provide reliable agency advice on stipulated facts in case of an actual controversy. Issuance of a declaratory decision is discretionary with the agency. Sections 635.060 (regulations governing declaratory decision) and 635.010 (declaratory decision permissive).

The agency determines which procedure to follow. If the agency follows the agency hearing procedure, it must provide a copy to the person to whom the decision is directed. Section 633.040(d) (regulations governing agency hearing procedure).

§ 631.030. When adjudicative proceeding not required

631.030. (a) An agency may provide any appropriate procedure for a decision that is not required to be conducted under this division.

(b) A proceeding is not required under this division for informal factfinding or informal investigatory hearing, or for a decision to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court, whether in response to an application for an agency decision or otherwise.

(c) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting a proceeding under this division.

Comment. Subdivision (a) of Section 631.030 is subject to statutory specification of the applicable procedure for decisions not governed by this division. Cf. Section 612.150 (contrary express statute controls).

Subdivision (b) is drawn in part from 1981 Model State APA § 4-101(a). The provision lists situations in which an agency may issue a decision without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before an agency or court. Likewise, an agency may issue an agency pleading under this division without first conducting a proceeding to decide whether to issue the pleading. See, e.g., Sections 642.210 (initiation by agency) and 610.290 ("agency pleading" defined).

Subdivision (c) is subject to Section 646.210 (settlement) in the case of a formal hearing procedure.

CHAPTER 2. INFORMAL HEARING

§ 632.010. Purpose of informal hearing procedure

632.010. If an agency decision is required to be formulated and issued under this division, the agency may select the informal hearing procedure to govern the adjudicative proceeding, subject to the limitations in this chapter. The informal hearing procedure is intended as an adjudicative proceeding that satisfies due process and public policy requirements in a manner that is simpler and more expeditious than the formal hearing procedure, for use in appropriate circumstances. The procedure provides an informal forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer. The procedure also provides a forum that may accommodate a hearing where by regulation or statute a member of the public may participate without intervening as a party.

Comment. Section 632.010 states the policy that underlies the informal hearing procedure. The circumstances where the simplified procedure are appropriate are provided in Section 632.020 (when informal hearing may be used). The simplified procedures are outlined in Section 632.030 (procedure for informal hearing).

Basic due process and public policy protections of the formal hearing procedure are preserved in the informal hearing, however. Section 632.030(b). Thus, for example, the presiding officer must be free of bias, prejudice, and interest, the adjudicatory function must be separated from the investigative, prosecutorial, and advocacy functions within the agency, the hearing must be open to public observation, the agency must make available language assistance, ex parte communications are restricted, the decision must be in writing, be based

on the record, and include a statement of the factual and legal basis of the decision, and the agency must designate and index significant decisions as precedent.

§ 632.020. When informal hearing may be used

632.020. An informal hearing procedure may be used in any of the following proceedings:

(a) A proceeding where there is no disputed issue of material fact.

(b) A proceeding where there is a disputed issue of material fact, if the matter involves only:

(1) A monetary amount of not more than $1,000.

(2) A disciplinary sanction against a prisoner.

(3) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days.

(4) A disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.

(5) A disciplinary sanction against a licensee that does not involve revocation, suspension, annulment, withdrawal, or amendment of a license.

(c) A proceeding where, by regulation, the agency has authorized use of an informal hearing, if in the circumstances its use does not violate a statute or the federal or state constitution.

Comment. Subdivision (a) of Section 632.020 permits the informal hearing to be used, regardless of the type or amount at issue, if no disputed issue of material fact has appeared. An example might be a power plant siting proceeding in which the power company and the Energy Commission have agreed on all material facts. If, however, consumers intervene and raise material fact disputes, the proceeding will be subject to conversion from the informal hearing to the formal hearing in accordance with Sections 614.010-614.050.

Subdivision (b) permits the informal hearing to be used, even if a disputed issue of material fact has appeared, if the amount or other stake involved is relatively minor, or if the matter involves a disciplinary sanction against a prisoner. The reference to a "licensee" in subdivision (b)(5) includes a certificate holder. Section 610.360 ("license" defined).

Subdivision (c) imposes no limits on the authority of the agency to adopt the informal hearing by regulation, other than statutory and constitutional due process limitations.

§ 632.030. Procedure for informal hearing

632.030. (a) In an informal hearing the presiding officer shall regulate the course of the proceeding and may limit pleadings, intervention, discovery, prehearing conferences, witnesses, testimony, evidence, rebuttal, and argument, provided that the presiding officer shall permit the parties and may permit others to offer written or oral comments on the issues.

(b) With respect to matters not covered by subdivision (a), the provisions of Part 4 (commencing with Section 641.110) apply.

Comment. Section 632.030 is drawn from 1981 Model State APA § 4-402. The section indicates that the informal hearing is a "peeled down" version of the formal hearing. The informal hearing need not have a prehearing conference, discovery, or testimony of anyone other than the parties. However, it is intended to permit agencies to allow public participation where appropriate. Section 632.010 (purpose of informal hearing procedure).

§ 632.040. Cross-examination

632.040. (a) The presiding officer may preclude use of the informal hearing if it appears to the presiding officer that in the circumstances cross-examination of witnesses will be necessary for proper determination of the matter, and any delay, burden, or complication due to cross-examination will be more than minimal.

(b) If after an informal hearing is commenced it appears that the requirements of subdivision (a) are satisfied, the presiding officer may convert the informal hearing to a formal hearing.

Comment. Section 632.040 gives the presiding officer discretion to limit availability of the informal hearing in situations where it appears that substantial cross-examination will be necessary. For provisions on conversion, see Sections 614.010-614.050

§ 632.050. Proposed proof

632.050. (a) If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require a party to state the identity of the witnesses or other sources through which the party would propose to present proof if the proceeding were converted to a formal hearing. If disclosure of a fact, allegation, or source is privileged or expressly prohibited by a regulation, statute, or federal or state constitution, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

(b) If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from which the party would propose to obtain the facts if the proceeding were converted to a formal hearing.

Comment. Section 632.050 is drawn from 1981 Model State APA § 4-403. For conversion of proceedings, see Sections 614.010-614.050.

CHAPTER 3. AGENCY HEARING

§ 633.010. Agency hearing procedure authorized

633.010. If an agency decision is required to be formulated and issued under this division, the agency may provide a procedure to govern the adjudicative proceeding, subject to the limitations in this chapter. Part 4 (commencing with Section 641.110) does not apply to an agency hearing procedure except to the extent provided in the agency hearing procedure.

Comment. Section 633.010 recognizes the authority of an agency to provide different procedures than those provided in this division to the extent authorized in this chapter. This authority is limited to proceedings that by statute are exempt from the requirement that they be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 633.020 (decisions for which agency hearing procedure authorized). The procedure must satisfy basic due process and public interest requirements. Section 633.030 (requirements of agency hearing procedure). The procedure must be adopted through the regulation process, and must be made available to persons who appear before the agency.

Section 633.040 (regulations governing agency hearing procedure). The agency procedure is subject to a statute applicable to the particular agency or proceeding. Section 612.140 (contrary express statute controls).

For special expedited agency process, including the ability to incorporate or readopt existing regulations, see Section 633.050 (transitional provision for adoption of regulations).

§ 633.020. Decisions for which agency hearing procedure not authorized

633.020. An agency may not provide an agency hearing procedure pursuant to this chapter except in an adjudicative proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 633.020 limits the matters for which an agency hearing procedure may be used to those exempt from OAH hearing officer requirements. Cf. Section 643.110 (OAH administrative law judge as presiding officer).

§ 633.030. Requirements of agency hearing procedure

633.030. An agency hearing procedure shall provide an evidentiary hearing for determination of facts and shall include provisions that satisfy all of the following requirements:

(a) The presiding officer shall be free of bias, prejudice, and interest to the extent provided in Article 2 (commencing with Section 643.210) of Chapter 3 of Part 4 (disqualification).

(b) The adjudicatory function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency to the extent provided in Article 3 (commencing with Section 643.320) of Chapter 3 of Part 4 (separation of functions).

(c) The hearing shall be open to public observation to the extent provided in Section 648.140 (open hearings).

(d) The agency shall make available language assistance to the extent provided in Article 2 (commencing with Section 648.210) of Chapter 8 of Part 4 (language assistance), if the agency is listed in Section 648.230.

(e) Each party shall have the right to present and rebut evidence.

(f) Ex parte communications shall be restricted to the extent provided in Article 5 (commencing with Section 648.510) of Chapter 8 of Part 4 (ex parte communications).

(g) The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision to the extent provided in Section 649.120 (form and contents of decision).

(h) The agency shall designate and index significant decisions as precedent to the extent provided in Article 3 (commencing with Section 649.310) of Chapter 9 of Part 4 (precedent decisions).

Comment. Section 633.030 specifies the minimum due process and public interest requirements that must be satisfied by an agency hearing procedure elected by an agency. The requirements may be satisfied simply by incorporating by reference in the agency hearing procedure the relevant provisions of Part 4 (commencing with Section 641.110)

(formal hearing), or by stating provisions equivalent to or more protective of the rights of the parties than the relevant provisions of Part 4.. See Section 633.040 (regulations governing agency hearing procedure). Nothing in this section precludes the agency from adopting additional or more extensive requirements than those prescribed by this section.

Of course, there are other fundamental due process elements inherent in a "hearing" that are not itemized in this section, such as notice to the affected parties and an opportunity to be heard by the presiding officer.

It should be noted that some of the requirements of this section have limited application. See, e.g., Article 2 (commencing with Section 648.210) of Chapter 8 of Part 4 (language assistance), which applies only to designated agencies.

It should also be noted that any special statutes expressly applicable to a hearing by an agency prevail over contrary provisions of this section. Section 612.140 (contrary express statute controls).

§ 633.040. Regulations governing agency hearing procedure

633.040. (a) An agency hearing procedure shall be provided by regulation adopted by the agency pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, subject to Section 633.050 (transitional provision for adoption of regulations).

(b) The regulation providing an agency hearing procedure may do any of the following:

(1) State the agency hearing procedure in a complete and self-sufficient body.

(2) State some provisions of the agency hearing procedure explicitly and state other provisions of the agency hearing procedure by incorporating by reference provisions of Part 4 (commencing with Section 641.110) (formal hearing).

(3) Adopt Part 4 (commencing with Section 641.110) (formal hearing) as the agency hearing procedure, subject to appropriate exceptions.

(c) The regulation providing an agency hearing procedure shall state at the beginning the specific provisions of the regulation that satisfy Section 633.030 (requirements of agency hearing procedure). Section 633.030 may be satisfied by incorporating by reference the relevant provisions of Part 4 (commencing with Section 641.110) (formal hearing), or by stating provisions equivalent to, or more protective of the rights of parties than, the relevant provisions of Part 4.

(d) An agency shall provide a copy of the agency hearing procedure, together with a copy of or reference to any other statute that governs the particular procedure, to any person to which the agency action is directed.

Comment. Section 633.040 requires promulgation of an agency hearing procedure under the normal rulemaking process, including notice to affected persons and an opportunity to be heard. The agency procedure is subject to a statute applicable to the particular agency or proceeding. Section 612.140 (contrary express statute controls). This section is intended to make agency hearing procedures accessible to persons affected by them.

§ 633.050. Transitional provision for adoption of regulations

633.050. (a) As used in this section, "preexisting agency procedure" means a regulation that governs an agency adjudicative proceeding properly adopted and

in effect in compliance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 before the operative date of this division.

(b) An agency regulation that does any of the following in connection with a preexisting agency procedure is not subject to further review under Article 6 (commencing with Section 11349) of Chapter 3.5:

(1) A regulation that does no more than identify the specific provisions of the preexisting agency procedure that satisfy Section 633.030 (requirements of agency hearing procedure).

(2) A regulation that does no more than incorporate by reference the relevant provisions of Part 4 (commencing with Section 641.110) (formal hearing) that satisfy Section 633.030 (requirements of agency hearing procedure).

(c) An agency regulation that does more than provided in subdivision (b) in connection with a preexisting agency procedure, or that adopts a new agency procedure, is subject to all the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, except that the agency regulation is not subject to review for necessity under Section 11349.1(a)(1).

(d) Notwithstanding any other provision of this section, a regulation promulgating an agency hearing procedure that qualifies as an interim regulation under Section 610.940 (adoption of regulations) is subject to review to the extent provided in that section.

Comment. Subdivision (b) of Section 633.050 provides a simplified implementation process for adoption of preexisting regulations as an agency hearing procedure. Subdivision (c) provides a simplified process for adoption of more extensive regulations as an agency hearing procedure. In either case, interim regulation treatment may be available. Subdivision (d).

CHAPTER 4. EMERGENCY DECISION

§ 634.005. Application of chapter

634.005. If an agency decision is required to be formulated and issued under this division, the agency may select the emergency decision procedure to govern the adjudicative proceeding, subject to the limitations in this chapter.

Comment. Section 634.005 makes clear that the emergency decision procedure provided in this chapter applies only to decisions subject to this division. See Section 631.010 (application to constitutionally and statutorily required hearings). It does not apply, for example, to an agency decision to seek injunctive relief. Section 631.030 (when adjudicative proceeding not required).

§ 634.010. Agency regulation required

634.010. (a) An agency may issue an emergency decision for temporary, interim relief under this chapter if the agency has adopted a regulation that makes this chapter applicable.

(b) The regulation shall do all of the following:

(1) Define the circumstances in which an emergency decision may be issued under this chapter.

(2) State the nature of the temporary, interim relief that the agency may order.

(3) Prescribe the procedures that will be available before and after issuance of an emergency decision under this chapter. The procedures may be more protective of the person to which the agency action is directed than those provided in this chapter.

(c) This section does not apply to an emergency decision issued pursuant to other express statutory authority.

Comment. Section 634.010 requires specificity in agency regulations that adopt an emergency decision procedure.

§ 634.020. When emergency decision available

634.020. (a) An agency may issue an emergency decision under this chapter in a situation involving an immediate danger to the public health, safety, or welfare that requires immediate agency action.

(b) An agency may take only action under this chapter that is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies issuance of an emergency decision.

(c) An emergency decision issued under this chapter is limited to temporary, interim relief. The temporary, interim relief is subject to administrative and judicial review under Sections 634.070 and 634.080, and the underlying issue giving rise to the temporary, interim relief is subject to an adjudicative proceeding pursuant to Section 634.050.

Comment. Section 634.020 is drawn from 1981 Model State APA § 4-501(a)-(b). The emergency decision procedure is available only if the agency has adopted an authorizing regulation. Section 634.010.

§ 634.030. Emergency decision procedure

634.030. (a) Before issuing an emergency decision under this chapter, the agency shall, if practicable, give the person to which the agency action is directed notice and an opportunity to be heard.

(b) Notice and hearing under this section may be oral or written, including notice and hearing by telephone, facsimile transmission, or other electronic means, as the circumstances permit. The hearing may be conducted in the same manner as an informal hearing.

Comment. Section 634.030 applies to the extent practicable in the circumstances of the particular emergency situation. The agency must use its discretion to determine the extent of the practicability, and give appropriate notice and opportunity to be heard accordingly. For the conduct of a hearing in the manner of an informal hearing, see Section 632.030 (procedure for informal hearing).

By regulation the agency may prescribe the emergency notice and hearing procedure. See, e.g., State Bar Rules 789-798 (proceedings re involuntary transfer to inactive status upon a finding that the attorney's conduct poses a substantial threat of harm to the public or the attorney's clients). The regulation may be more protective to the person to which the agency action is directed than the provisions of this chapter. Section 634.010 (agency regulation required).

See also Section 613.230 (extension of time).

§ 634.040. Emergency decision

634.040. (a) The agency shall issue an emergency decision, including a brief explanation of the factual and legal basis and reasons for the emergency decision, to justify the determination of an immediate danger and the agency's emergency decision to take the specific action.

(b) The agency shall give notice to the extent practicable to the person to which the agency action is directed. The emergency decision is effective when issued.

Comment. Section 634.040 is drawn from 1981 Model State APA § 4-501(c)-(d). Under this section the agency has flexibility to issue its emergency decision orally, if necessary to cope with the emergency. See also Section 613.230 (extension of time).

§ 634.050. Completion of proceedings

634.050. (a) After issuing an emergency decision under this chapter for temporary, interim relief, the agency shall conduct an adjudicative proceeding under another procedure provided for in this division to resolve the underlying issues giving rise to the temporary, interim relief.

(b) The agency shall commence an adjudicative proceeding under the formal, informal, or agency hearing procedure within 10 days after issuing an emergency decision under this chapter, notwithstanding the pendency of proceedings for administrative or judicial review of the emergency decision.

Comment. Section 634.050 is drawn from 1981 Model State APA § 4-501(e). If the emergency proceedings have rendered the matter completely moot, this section does not direct the agency to conduct useless follow-up proceedings, since these would not be required in the circumstances.

§ 634.060. Agency record

634.060. (a) The agency record consists of any documents concerning the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(b) Unless otherwise required by regulation, statute, or federal or state constitution, the agency record need not constitute the exclusive basis for an emergency decision or for administrative or judicial review of an emergency decision under this chapter.

Comment. Section 634.060 is drawn from 1981 Model State APA § 4-501(f)-(g). Under this section the agency has flexibility to act on the basis of nonrecord information if necessary to cope with the emergency.

§ 634.070. Agency review

634.070. (a) On petition by the person to which the agency action is directed, the agency head or other reviewing authority shall, on the earliest day that the business of the agency will admit of, but not later than 15 days after service of the petition on the agency, review and confirm, revoke, or modify an emergency decision issued under this chapter.

(b) The procedure for administrative review of the emergency decision under this section shall be the same as the procedure for administrative review of a proposed decision under Section 649.230.

Comment. Section 634.070 requires prompt administrative review of an emergency decision on petition of the person to which the agency action is directed. Administrative review under this section is not a prerequisite for judicial review. See Section 634.080 (judicial review).

The administrative review procedure is prescribed in Section 649.230. The procedure includes decision on the record, with the possibility of supplementation by additional evidence. Section 649.230(a). Each party has an opportunity to present a written brief or oral argument, as determined by the reviewing authority. Section 649.230(b).

§ 634.080. Judicial review

634.080. (a) On issuance of an emergency decision under this chapter, the person to which the agency action is directed may obtain judicial review of the decision in the manner provided in this section without prior administrative review.

(b) On confirmation or modification of an emergency decision pursuant to Section 634.070, the person to which the agency action is directed may obtain judicial review of the decision in the manner provided in this section.

(c) Judicial review under this section shall be pursuant to Section 1094.5 of the Code of Civil Procedure, subject to the following provisions:

(1) The hearing shall be on the earliest day that the business of the court will admit of, but not later than 15 days after service of the petition on the agency.

(2) Where it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(3) The relief that may be ordered on judicial review is limited to a stay of the emergency decision.

Comment. Section 634.080 is drawn from Section 11529(h) (interim suspension of medical care professional).

CHAPTER 5. DECLARATORY DECISION

§ 635.005. Application of chapter

635.005. If an agency decision is required to be formulated and issued under this division, the agency may select the declaratory decision procedure to govern the adjudicative proceeding, subject to the limitations in this chapter.

Comment. Section 635.005 makes clear that the declaratory decision procedure provided in this chapter applies only to decisions subject to this division. See Section 631.010 (application to constitutionally and statutorily required hearings).

§ 635.010. Declaratory decision permissive

635.010. (a) In case of an actual controversy, a person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency.

(b) The agency in its discretion may issue a declaratory decision in response to the application. The agency shall not issue a declaratory decision if the agency determines that any of the following applies:

(1) Issuance of the decision would be contrary to a regulation adopted under this chapter.

(2) The decision would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory decision proceeding.

(c) An application for a declaratory decision is not required for exhaustion of the applicant's administrative remedies for purposes of judicial review.

Comment. Chapter 5 (commencing with Section 635.060) creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances.

It should be noted that an agency not governed by this chapter nonetheless has general power to issue a declaratory decision. This power is derived from the power to adjudicate. See, e.g., M. Asimow, Advice to the Public from Federal Administrative Agencies 121-22 (1973).

For the procedure by which an interested person may petition requesting adoption, amendment, or repeal of a regulation, see Gov't Code §§ 11347-11347.1.

Subdivisions (a) and (b) are drawn from 1981 Model State APA § 2-103(a); subdivision (c) is new. Unlike the model act, Section 635.010 is applicable only to cases involving an actual controversy, and issuance of a declaratory decision is discretionary with, rather than mandatory for, the agency.

This section prohibits an agency from issuing a declaratory decision that would substantially prejudice the rights of a person who would be indispensable—that is a "necessary"—party, and who does not consent to the determination of the matter by a declaratory decision proceeding. Such a person may refuse to give consent because in a declaratory decision proceeding the person might not have all of the same procedural rights the person would have in another type of adjudicative proceeding to which the person would be entitled.

§ 635.020. Notice of application

635.020. Within 30 days after receipt of an application for a declaratory decision, an agency shall give notice of the application to all persons to which notice of an adjudicative proceeding is otherwise required, and may give notice to any other person.

Comment. Section 635.020 is drawn from 1981 Model State APA § 2-103(c). See also Section 613.230 (extension of time).

§ 635.030. Applicability of rules governing administrative adjudication

635.030. (a) The provisions of Part 4 (commencing with Section 641.110) do not apply to an agency proceeding for a declaratory decision except to the

extent provided in this chapter or to the extent the agency so provides by regulation or order.

(b) Notwithstanding subdivision (a), a person who qualifies under Chapter 4 (commencing with Section 644.110) of Part 4 (intervention) and files a timely motion for intervention in accordance with agency regulations may intervene in a proceeding for a declaratory decision.

Comment. Section 635.030 is drawn from 1981 Model State APA § 2-103(d). It makes clear that persons must be allowed to intervene in a declaratory decision proceeding to the same extent they are allowed to intervene in other adjudicative proceedings under the formal hearing procedure. It also makes clear that all the other specific procedural requirements for adjudications imposed by the formal hearing procedure on an agency when it conducts an adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the agency elects to make some or all of them applicable.

Regulations specifying precise procedures available in a declaratory proceeding may be adopted under Section 635.060. The reason for exempting a declaratory decision from usual procedural requirements for adjudications provided in this part is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicative provisions have no applicability. For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with.

Note that there are no contested issues of fact in a declaratory decision proceeding because its function is to declare the applicability of the law in question to unproven facts furnished by the applicant. The actual existence of the facts on which the decision is based will usually become an issue only in a later proceeding in which a party to the declaratory decision proceeding seeks to use the decision as a justification of the party's conduct.

Note also that the party requesting a declaratory decision has the choice of refraining from filing such an application and awaiting the ordinary agency adjudicative process governed by this part.

A declaratory decision is, of course, subject to provisions governing judicial review of agency decisions and for public inspection and indexing of agency decisions. See, e.g., Sections 6250-6268 (California Public Records Act). A declaratory decision may be given precedential effect, subject to the provisions governing precedent decisions. See Sections 649.310-649.340 (precedent decisions).

§ 635.040. Action of agency

635.040. (a) Within 60 days after receipt of an application for a declaratory decision, an agency shall do one of the following, in writing:

(1) Issue a decision declaring the applicability of the statute, regulation, or decision in question to the specified circumstances.

(2) Set the matter for specified proceedings.

(3) Agree to issue a declaratory decision by a specified time.

(4) Decline to issue a declaratory decision, stating in writing the reasons for its action. Agency action under this paragraph is not subject to administrative or judicial review.

(b) A copy of the agency's action under subdivision (a) shall be served promptly on the applicant and any other party.

(c) If an agency has not taken action under subdivision (a) within 60 days after receipt of an application for a declaratory decision, the agency is considered to have declined to issue a declaratory decision on the matter.

Comment. Subdivision (a) of Section 635.040 is drawn from 1981 Model State APA § 2-103(e). The requirement that an agency dispose of an application within 60 days ensures a timely agency response to a declaratory decision application, thereby facilitating planning by affected parties.

Subdivision (b) is drawn from 1981 Model State APA § 2-103(f). It requires that the agency communicate to the applicant and to any other parties any action it takes in response to an application for a declaratory decision. This includes each of the types of actions listed in paragraphs (1)-(4) of subdivision (a). Service is made by personal delivery or mail or other means to the last known address of the person to which the agency action is directed. Sections 613.210 (service) and 613.220 (mail).

The decision by an agency whether or not to issue a declaratory decision is within the absolute discretion of the agency and is therefore not reviewable. Subdivision (a)(4).

§ 635.050. Declaratory decision

635.050. (a) A declaratory decision shall contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for its conclusion.

(b) A declaratory decision has the same status and binding effect as any other decision issued in an agency adjudicative proceeding.

Comment. Section 635.050 is drawn from 1981 Model State APA § 2-103(g). A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications.

Note that a declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it was issued.

Note also that the requirement in this section that each declaratory decision issued contain the facts on which it is based and the reasons for its conclusion will facilitate any subsequent judicial review of the decision's legality. It also ensures a clear record of what occurred for the parties and other persons interested in the decision because of its possible precedential effect.

§ 635.060. Regulations governing declaratory decision

635.060. (a) The Office of Administrative Hearings shall adopt and promulgate model regulations under this chapter that are consistent with the public interest and with the general policy of this chapter to facilitate and encourage agency issuance of reliable advice. The model regulations shall provide for all of the following:

(1) A description of the classes of circumstances in which an agency will not issue a declaratory decision.

(2) The form, contents, and filing of an application for a declaratory decision.

(3) The procedural rights of a person in relation to an application.

(4) The disposition of an application.

(b) The regulations adopted by the Office of Administrative Hearings under this chapter apply in an adjudicative proceeding unless an agency adopts its own regulations to govern declaratory decisions of the agency.

(c) By regulation an agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable.

Comment. Section 635.060 is drawn from 1981 Model State APA § 2-103(b). An agency may choose to preclude declaratory decisions altogether.

Regulations should specify all of the details surrounding the declaratory decision process including a specification of the precise form and contents of the application; when, how, and where an application is to be filed; whether an applicant has the right to an oral argument; the circumstances in which the agency will not issue a decision; and the like.

Regulations also should require a clear and precise presentation of facts, so that an agency will not be required to rule on the application of law to unclear or excessively general facts. The regulations should make clear that, if the facts are not sufficiently precise, the agency can require additional facts or a narrowing of the application.

Agency regulations on this subject will be valid so long as the requirements they impose are reasonable and are within the scope of agency discretion. To be valid these rules must also be consistent with the public interest—which includes the efficient and effective accomplishment of the agency's mission—and the express general policy of this chapter to facilitate and encourage the issuance of reliable agency advice. Within these general limits, therefore, an agency may include in its rules reasonable standing, ripeness, and other requirements for obtaining a declaratory decision.

CHAPTER 6. OFFICE OF ADMINISTRATIVE HEARINGS

Article 1. General Provisions

§ 636.110. Definitions

636.110. Unless the provision or context requires otherwise, the following definitions govern the construction of this chapter:

(a) "Director" means the executive officer of the Office of Administrative Hearings.

(b) "Office" means the Office of Administrative Hearings.

Comment. Subdivision (a) of Section 636.110 restates former Section 11370.1. Subdivision (b) is new.

§ 636.120. Office of Administrative Hearings

636.120. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as an administrative law judge employed by the office, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) A reference in a statute or regulation to the Office of Administrative Procedure means the Office of Administrative Hearings.

Comment. Section 636.120 restates former Section 11370.2.

§ 636.130. Administrative law judges

636.130. (a) The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges sufficient to fill the needs of the various state agencies.

(b) An administrative law judge employed by the office shall have been admitted to practice law in this state for at least five years immediately preceding the appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. Subdivision (a) of Section 636.130 restates the first sentence of former Section 11370.3 and the second sentence of former Section 11502.

Subdivision (b) restates the third sentence of former Section 11502.

§ 636.140. Hearing personnel

636.140. The director shall appoint hearing reporters and such other technical and clerical personnel as may be required to perform the duties of the office.

Comment. Section 636.140 restates the second sentence of former Section 11370.3, deleting the reference to "hearing officers" and the "shorthand" hearing reporter limitation.

§ 636.150. Assignment of administrative law judges

636.150. (a) The director shall assign an administrative law judge employed by the office for an adjudicative proceeding under this division except a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the office.

(b) On request from an agency, the director may assign an administrative law judge employed by the office for an adjudicative proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the office.

(c) The director shall assign a hearing reporter as required.

(d) An administrative law judge employed by the office or other employee assigned under this section is considered an employee of the office and not of the agency to which the administrative law judge or other employee is assigned.

(e) When not engaged in conducting an adjudicative proceeding, an administrative law judge employed by the office may be assigned by the director to perform other duties vested in or required of the office, including those provided in Section 636.180.

Comment. Subdivision (a) of Section 636.150 supersedes the first part of the third sentence of former Section 11370.3. This provision applies to the informal hearing procedure as well as to the formal hearing procedure. Section 632.030(b) (procedure for informal hearing). Adjudicative proceedings exempted by statute from the requirement that they be conducted by an administrative law judge employed by the Office of Administrative Hearings include:

[All proceedings exempt under existing law.]

Subdivision (b) restates the second part of the third sentence of former Section 11370.3.

Subdivision (c) restates the third part of the third sentence of former Section 11370.3.

Subdivision (d) restates the fifth sentence of former Section 11370.3.

Subdivision (e) restates the sixth sentence of former Section 11370.3.

§ 636.160. Regulations

636.160. The office may adopt regulations for all of the following purposes:

(a) To establish further qualifications of administrative law judges employed by the office.

(b) To establish procedures for agencies to request and for the director to assign administrative law judges employed by the office.

(c) To establish procedures and adopt forms, consistent with this division and other law, to govern administrative law judges employed by the office and to govern adjudicative proceedings under this division to the extent expressly provided by statute.

(d) To establish standards and procedures for the evaluation, training, promotion, and discipline of administrative law judges employed by the office.

(e) To facilitate the performance of the responsibilities conferred on the office by this part.

Comment. Section 636.160 is drawn from 1981 Model State APA § 4-301(e).

§ 636.170. Cost of operation

636.170. The total cost to the state of maintaining and operating the office shall be determined and collected by the Department of General Services in advance or on such other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Section 636.170 restates former Section 11370.4.

§ 636.180. Study of administrative adjudication

636.180. (a) The office is authorized and directed to:

(1) Study the subject of administrative adjudication in all its aspects.

(2) Submit its suggestions to the various agencies in the interests of fairness, uniformity, and the expedition of business.

(3) Report its recommendations to the Governor and Legislature at the commencement of each general session.

(b) All agencies of the state shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control. Nothing in this subdivision authorizes an agency to give access to records required by statute to be kept confidential.

Comment. Section 636.180 restates former Section 11370.5 to the extent it related to the subject of administrative adjudication, with the addition of language protecting confidentiality of records. See also Section 610.190 ("agency" defined). For authority of the Office of Administrative law to study administrative rulemaking, see Section 11340.4.

Article 2. Medical Quality Hearing Panel

§ 636.210. Establishment and qualifications of panel

636.210. (a) There is within the Office of Administrative Hearings a Medical Quality Hearing Panel, consisting of no fewer than five full-time administrative law judges. The administrative law judges shall have medical training as recommended by the Division of Medical Quality of the Medical Board of California and approved by the Director of the Office of Administrative Hearings.

(b) The director shall determine the qualifications of panel members, supervise their training, and coordinate the publication of a reporter of decisions pursuant to this section. The panel shall include only those persons specifically qualified and shall at no time constitute more than 25 percent of the total number of administrative law judges within the Office of Administrative Hearings. If the members of the panel do not have a full workload, they may be assigned work by the Director of the Office of Administrative Hearings. When the medically related case workload exceeds the capacity of the members of the panel, additional judges shall be requested to be added to the panels as appropriate. When this workload overflow occurs on a temporary basis, the Director of the Office of Administrative Hearings shall supply judges from the Office of Administrative Hearings to adjudicate the cases.

(c) The decisions of the administrative law judges of the panel, together with any court decisions reviewing those decisions, or any court decisions relevant to medical quality adjudications shall be published in a quarterly "Medical Discipline Report," to be funded from the Contingent Fund of the Medical Board of California.

(d) The administrative law judges of the panel shall have panels of experts available. The panels of experts shall be appointed by the Director of the Office of Administrative Hearings, with the advice of the Medical Board of California. These panels of experts may be called as witnesses by the administrative law judges of the panel to testify on the record about any matter relevant to a proceeding and subject to cross examination by all parties. The administrative law judge may award reasonable expert witness fees to any person or persons serving on a panel of experts, which shall be paid from the Contingent Fund of the Medical Board of California.

(e) On or before April 1, 1997, the Medical Board of California shall prepare, in consultation with the Office of Administrative Hearings, an analysis and report that evaluates the effectiveness of the Medical Quality Hearing Panel since its creation. Among other things, the report shall analyze whether administrative adjudications against physicians have been expedited, the aging of cases at the office, whether administrative decisions and penalties ordered in the discipline of physicians have become more consistent, and whether the panels of the Division of Medical Quality have adopted more proposed decisions than prior to the creation of the panel. The board shall send a copy of its report to the

Chairpersons of the Senate Committee on Business and Professions and the Assembly Committee on Health, to the Office of Administrative Hearings, and to the Director of Consumer Affairs.

(f) This section shall remain in effect only until January 1, 1997, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1997, deletes or extends that date.

Comment. Section 636.210 continues former Section 11371 without change.

§ 636.220. Conduct of hearing by administrative law judge

636.220. (a) Except as provided in subdivision (b), all adjudicative hearings and proceedings relating to the discipline or reinstatement of licensees of the Medical Board of California, including licensees of allied health agencies within the jurisdiction of the Medical Board of California, that are heard pursuant to this division, shall be conducted by an administrative law judge as designated in Section 636.210, sitting alone if the case is so assigned by the agency filing the charging pleading.

(b) Proceedings relating to interim orders shall be heard in accordance with Section [11529].

Comment. Section 636.220 continues former Section 11372 without substantive change.

§ 636.230. Conduct of proceedings under Administrative Procedure Act

636.230. All adjudicative hearings and proceedings conducted by an administrative law judge as designated in Section 636.210 shall be conducted under the terms and conditions set forth in this division, except as provided in the Medical Practice Act (Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code).

Comment. Section 636.230 continues former Section 11373 without substantive change.

§ 636.240. Facilities and support personnel for review committee panel

636.240. The Office of Administrative Hearings shall provide facilities and support personnel for the review committee panel and shall assess the Medical Board of California for facilities and personnel, where used to adjudicate cases involving the Medical Board of California.

Comment. Section 636.240 continues former Section 11373.3 without change.

PART 4. FORMAL HEARING

CHAPTER 1. APPLICABLE LAW AND REGULATIONS

§ 641.110. Application of part

641.110. (a) This part provides the formal hearing procedure.

(b) The formal hearing procedure governs conduct of an adjudicative proceeding for formulation and issuance of a decision under this division unless a

different procedure is authorized and selected by the agency under Section 631.020 (applicable procedure)

Comment. Section 641.110 makes clear that the formal hearing procedure is the default procedure where a hearing is constitutionally or statutorily required. Section 631.010 (application to constitutionally and statutorily required hearings). Unless another hearing procedure is authorized and selected by the agency, this part governs the hearing.

Other hearing procedures are available in some circumstances. Section 631.020 (applicable procedure). The informal hearing procedure is available in small cases and cases where there is no disputed issue of fact, and in other cases designated by the agency where due process will allow it. Section 632.020 (when informal hearing may be used). An agency hearing procedure may be available in cases exempt from hearing by Office of Administrative Hearings personnel. Section 633.020 (decisions for which agency hearing procedure not authorized). The emergency decision procedure may be available in cases of immediate need. Section 634.020 (when emergency decision available). The declaratory decision procedure may be available in a case of stipulated facts. Section 635.010 (declaratory decision permissive).

§ 641.120. Modification or inapplicability of statute by regulation

641.120. (a) Except as otherwise provided in this section, if a provision of this part authorizes an agency to modify this part or make this part inapplicable by regulation, the agency may, to that extent, adopt a regulation pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, that modifies this part or makes this part inapplicable, and the regulation so adopted, and not this part, governs the matter.

(b) A provision of this part that authorizes an agency to modify this part or make this part inapplicable by regulation is subject to a statute that governs the matter expressly.

(c) An agency that adopts a regulation that modifies a provision of this part or makes a provision of this part inapplicable shall provide a copy of the regulation to any person to which the agency action is directed.

Comment. Section 641.120 recognizes that a number of the provisions of this part may be modified or made inapplicable by an agency to suit the circumstances of the particular type of adjudication administered by it. See, e.g., Sections 647.210 (regulations making alternative dispute resolution inapplicable), 648.310 (burden of proof). The modification or inapplicability may occur only by regulation duly adopted and promulgated under the Administrative Procedure Act. The modification may alter, or make inapplicable to the agency's adjudicative proceedings, the particular provision as to which modification or inapplicability is permitted. For transitional provisions governing interim adoption of regulations, see Section 610.940 (adoption of regulations).

§ 641.130. Compilation of regulations governing adjudicative proceeding

641.130. (a) Regulations adopted by the Office of Administrative Hearings under this division or by any other agency under this part to govern an adjudicative proceeding shall be compiled in one title of the California Code of Regulations relating to administrative procedure.

(b) Regulations compiled pursuant to subdivision (a) may be duplicated in a title of the California Code of Regulations that includes other regulations of the

adopting agency if applicable regulations adopted by the Office of Administrative Hearings are duplicated with them or are cross-referenced by them.

Comment. Section 641.130 is intended to facilitate access by the public to the law governing administrative procedure. Just as this division consolidates administrative procedure statutes, the California Code of Regulations should consolidate administrative procedure regulations. Consolidation of regulations is particularly important since administrative procedures of an agency may be affected not only by regulations adopted by the agency but also by regulations adopted by the Office of Administrative Hearings. See, e.g., Section 635.060 (regulations governing declaratory decision adopted by OAH).

CHAPTER 2. COMMENCEMENT OF PROCEEDING

Article 1. [Reserved]

Article 2. Initiation

§ 642.210. Initiation by agency

642.210. An agency may commence and conduct an adjudicative proceeding with respect to a matter within the agency's jurisdiction.

Comment. Section 642.210 is drawn from 1981 Model State APA § 4-102(a). It prevents any implication that Section 642.220 (application for decision) sets forth the exclusive circumstances under which an agency may initiate an adjudicative proceeding.

§ 642.220. Application for decision

642.220. (a) Any person may make an application for an agency decision.

(b) An application for an agency decision includes an application for the agency to commence and conduct an appropriate adjudicative proceeding, whether or not the applicant expressly requests the proceeding.

Comment. Section 642.220 is drawn from 1981 Model State APA § 4-102(c). It ensures that a person who requests an agency to issue a decision, but does not expressly request the agency to commence an adjudicative proceeding, will not on that account be regarded as having waived the right to any available adjudicative proceeding. This assurance may be especially important to protect unrepresented parties.

In addition, this provision clarifies that the term "application", as used in this part, may refer either to the request for the agency to issue a decision, or to the request for the agency to conduct an appropriate adjudicative proceeding, or both, as the context suggests. Similarly, the term "applicant" may be used with either or both meanings.

§ 642.230. Agency action on application

642.230. An agency shall commence an adjudicative proceeding on application of a person for an agency decision for which a hearing is required by Section 631.010 (application to constitutionally and statutorily required hearings), unless any of the following provisions applies:

(a) The agency lacks jurisdiction of the subject matter.

(b) Resolution of the matter requires the agency to exercise discretion within the scope of subdivision (b) of Section 631.030 (when adjudicative proceeding not required).

(c) A statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding and, in the exercise of discretion, the agency has determined not to conduct an adjudicative proceeding.

(d) Resolution of the matter does not require the agency to issue a decision that determines the applicant's legal rights, duties, privileges, immunities, or other legal interests.

(e) The matter is not timely submitted to the agency.

(f) The matter is not submitted in a form substantially complying with an applicable statute or regulation.

Comment. Section 642.230 is drawn from 1981 Model State APA § 4-102(b). It supersedes any implication that may have been found under former Sections 11503 and 11504 that a third party has a right to demand that an agency conduct a proceeding. There may, however, be other specific statutes that provide initiation rights to third parties. See, e.g., Bus. & Prof. Code § 24203 (accusations against liquor licensees filed by various public officials).

Section 642.230 requires an agency to conduct an adjudicative proceeding on application of any person for an agency decision within the scope of this part. If the agency determines that any of the exceptions provided in this section is applicable, the agency may deny the application without commencing an adjudicative proceeding, or the agency may, in its discretion under Section 642.210, commence an adjudicative proceeding although under no compulsion to do so. For the time within which an agency must act with respect to an application, see Section 642.240 (time for agency action). In situations where none of the exceptions is applicable, this section establishes the right of a person to require an agency to conduct an adjudicative proceeding.

The introductory clause reinforces the point that this part only applies where a hearing is statutorily or constitutionally required. See Section 631.010 (application to constitutionally and statutorily required hearings).

Subdivision (b) relieves the agency from an obligation to conduct an adjudicative proceeding if resolution of the matter requires the agency to exercise discretion to initiate or not to initiate an investigation, prosecution, adjudicative proceeding, or other proceeding before the agency or another agency or a court. For example, a person who submits a complaint about a licensee cannot compel the licensing agency to conduct an adjudicative proceeding against the licensee; the agency may exercise prosecutorial discretion to determine whether to commence or not to commence an adjudicative proceeding in each case. The agency's decision whether or not to commence an adjudicative proceeding need not itself be preceded by an adjudicative proceeding. Section 631.030(b) (adjudicative proceeding not required for initiation decision).

Subdivision (c) does not and could not authorize an agency to deprive any person of procedural rights guaranteed by the constitution. If a statute purporting to authorize an agency to dispense with an adjudicative proceeding conflicts with constitutional guarantees, the agency may exercise its discretion under Section 642.210 to conduct an adjudicative proceeding even though the statute does not require it or, if the agency fails to conduct a constitutionally required adjudicative proceeding, a reviewing court may give appropriate relief.

Subdivision (d) closely relates to the definition of "decision" in Section 610.310 as "agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person". If the applicant does not request agency action that would fit within the definition of a "decision", the agency need not commence an adjudicative proceeding. For example, if a person asks the agency to commence an adjudicative proceeding for the purpose of adopting a rule, or of carrying out a housekeeping function that affects nobody's legal rights, the request would be subject to

denial because the requested agency action would not be a "decision". Subdivision (d) provides that an agency need not commence an adjudicative proceeding unless *the applicant's* legal rights, duties, privileges, immunities, or other legal interests are to be determined by the requested decision. Interpretation of these terms, ultimately a matter for the courts, will clarify the range of situations in which this part entitles a person to require an agency to conduct an adjudicative proceeding. The availability of various types of adjudicative proceedings may persuade courts to develop a more hospitable approach toward applicants than would have been feasible or practicable if the only available type of adjudicative proceeding were a trial-type, formal hearing.

§ 642.240. Time for agency action

642.240. (a) The time limits in this section apply except to the extent they are inconsistent with limits established by another statute for any stage of the proceeding.

(b) Within 30 days after receipt of an application for an agency decision, the agency shall examine the application, notify the applicant of any apparent error or omission, request any additional information from the applicant or another source that the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, official title, mailing address, and telephone number of an agency member or employee who may be contacted regarding the application. Nothing in this subdivision limits the authority of the agency to request additional information more than 30 days after receipt of an application for an agency decision, but such a request and any response to the request do not extend the time provided in subdivision (c).

(c) Within 90 days after the later of (i) receipt of an application for an agency decision or (ii) receipt of the response to a timely request made by the agency under subdivision (b), the agency shall do one of the following:

(1) Approve or deny the application, in whole or in part. The agency shall serve on the applicant a written notice of any denial, which shall include a brief statement of the agency's reasons and of any administrative review available to the applicant.

(2) Commence an adjudicative proceeding.

Comment. Section 642.240 is drawn from 1981 Model State APA § 4-104(a). See also Bus. & Prof. Code §§ 485, 487 (procedure on denial of license application). It establishes time limits and notification requirements for agency action on applications for decisions other than declaratory decisions. The effect of this section, when combined with Section 631.030, is that this part imposes no procedures on the agency when it decides not to conduct an adjudicative proceeding in response to an application for an agency decision, except to give a written notice of denial, with a brief statement of reasons and of any available administrative review. Agency decisions of this type, while not governed by the adjudicative procedures of this part, are subject to judicial review as a final agency action under Section [to be drafted].

Failure of an agency to meet the time limits provided in this section does not entitle the applicant to issuance of a license or other action sought in the application. The applicant's remedy for the agency's failure is judicial action by writ of mandate to compel appropriate agency action.

It should be noted that the time limits provided in this section are subject to contrary statutes that govern particular proceedings. See, e.g., Bus. & Prof. Code §§ 10086 (hearing

must commence within 30 days after request to Real Estate Commissioner); 11019 (hearing must commence within 15 days after request to Real Estate Commissioner).

See also Section 613.230 (extension of time).

Article 3. Pleadings

§ 642.310. Proceeding commenced by agency pleading

642.310. An adjudicative proceeding is commenced by issuance of an agency pleading.

Comment. Section 642.310 supersedes portions of the first sentences of former Sections 11503 and 11504. See also Section 610.290 ("agency pleading" includes accusation and statement of issues). Included among the issues that may be adjudicated are whether a right, authority, license, or privilege should be granted, issued, or renewed on application of a person, or revoked, suspended, limited, or conditioned on initiation of an agency. Sections 642.210-642.240 (initiation of proceeding).

It should be noted that by regulation an agency may require preparation of the agency pleading by another party or may permit a denied application to serve as the agency pleading. In such a case, verification is required unless by regulation the agency provides otherwise. Section 642.320 (contents of agency pleading).

§ 642.320. Contents of agency pleading

642.320. (a) The agency pleading shall be in writing and shall include all of the following:

(1) A statement that sets forth in ordinary and concise language the issues to be determined in the adjudicative proceeding, including any particular matters that have come to the attention of the agency and that would justify a decision against the person to which the agency action is directed and any acts or omissions with which the person is charged. The statement shall be sufficient to enable the person to prepare a case.

(2) A specification of the statutes and regulations that are at issue in the adjudicative proceeding, including any with which the person to which the agency action is directed must show compliance by producing proof at the hearing and any the person is alleged to have violated. The specification shall not consist merely of issues or charges phrased in the language of the statutes and regulations.

(3) The remedy sought.

(b) The agency pleading shall be verified unless made by a public officer acting in an official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Comment. Section 642.320 supersedes portions of former Sections 11503 and 11504. The verification requirement would apply where an agency permits preparation of the agency pleading by another party. *Cf.* Comment to Section 642.310 (proceeding commenced by agency pleading).

§ 642.330. Service of agency pleading and other information

642.330. (a) On issuance of the agency pleading, the issuing agency shall serve on the person to which the agency action is directed all of the following:

(1) A copy of the agency pleading.

(2) A statement to the person in the form provided in subdivision (b).

(3) A form of response that acknowledges service of the agency pleading and constitutes a response under Section 642.350.

(4) A copy of Chapter 5 (commencing with Section 645.110) (discovery).

(5) Any other information the agency determines is appropriate.

(b) The statement to the person to which the agency action is directed shall be substantially in the following form:

> You may request a hearing on this matter. If you do not request a hearing, [here insert name of agency] may proceed on the agency pleading without a hearing. Your failure to request a hearing does not preclude you from serving on [here insert name of agency] a statement by way of mitigation.
>
> In order to request a hearing, you or a person acting on your behalf must sign either the enclosed form entitled Response or your own form of response as provided in Section 642.350 of the Government Code, and deliver or send it to: [here insert name and address of agency]. You must deliver or send the response within 15 days after the agency pleading was personally served on you, or within 20 days after the agency pleading was sent to you.
>
> You may, but need not, be represented by an attorney or other authorized representative at any or all stages of this proceeding.
>
> To request the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Government Code Section 645.230 in the possession, custody, or control of the agency, you may contact: [here insert name and address of appropriate person].

(c) Notwithstanding Sections 613.210 (service) and 613.220 (mail), service under this section shall be by certified or registered mail or by personal delivery. Service may be by first class mail or other means pursuant to Section 613.220 to initiate an adjudicative proceeding before an independent appeals board or other independent agency if the person to which the agency action is directed has previously appeared in the same or a related proceeding.

Comment. Section 642.330 is drawn from former Sections 11504 and 11505. Service under this section is limited to personal service or registered or certified mail; first class mail is not permissible except in cases before an appeals board such as the Unemployment Insurance Appeals Board, where the person to which the agency action is directed has previous involvement in the controversy and initial service provisions are therefore unnecessary.

Service is made by personal delivery or by other appropriate means to the last known address of person to which the agency action is directed. Sections 613.210 (service) and 613.220 (mail). For this purpose, the person's last known address is the address maintained with the agency, if the person is required to maintain an address with the agency. Section 613.210(b).

An agency that fails properly to serve the person to which the agency action is directed does not acquire jurisdiction unless the person makes a general appearance. Section 642.340 (jurisdiction over person to which the agency action is directed).

The form of response may be a post card or other form provided by the agency. Signing and returning the form by the person to which the agency action is directed acknowledges service of the agency pleading and constitutes a response under Section 642.350.

The person to which the agency action is directed may be represented by an attorney or, in some circumstances, another authorized representative. See Sections 613.310-613.330 (representation of parties).

§ 642.340. Jurisdiction over person to which the agency action is directed

642.340. The agency shall make no decision that adversely affects a legal right, duty, privilege, immunity, or other legal interest of the person to which the agency action is directed unless the person has been served as provided in this article or has responded or otherwise appeared.

Comment. Section 642.340 restates a portion of former Section 11505(c).

§ 642.350. Response

642.350. (a) Within 15 days after service of the agency pleading, or a later time that the agency in its discretion permits, the person to which the agency action is directed may serve a response on the agency.

(b) A response shall be in writing signed by the person to which the agency action is directed and shall state the person's mailing address. It need not be verified or follow any particular form.

(c) A response may do one or more of the following:

(1) Request a hearing.

(2) Object to the agency pleading on the ground that it does not state an act or omission or other ground on which the agency may proceed.

(3) Object to the form of the agency pleading on the ground that it is so indefinite or uncertain that the person to which the agency action is directed cannot identify the transaction or prepare a case. Unless objection is taken under this paragraph, all further objections to the form of the agency pleading are considered waived.

(4) Admit the agency pleading in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the agency pleading on the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation adopted by another agency affecting substantive rights.

(7) Raise such other matter as may be appropriate.

(c) The person to which the agency action is directed is entitled to a hearing on the merits if the person serves a response on the agency under subdivision (a). A response constitutes a specific denial of all parts of the agency pleading not expressly admitted.

(d) Failure to serve a response on the agency under subdivision (a) is a default subject to the right of the person to which the agency action is directed to serve a statement by way of mitigation under Section 648.130 (default).

Comment. Section 642.350 is drawn from former Section 11506. See also Sections 613.340 (authority of attorney or other representative of party), 613.210 (service), 642.360 (amended and supplemental pleadings). If service is by mail or other means of delivery, the person to which the agency action is directed has 20 days after the date of sending in which to respond. Section 613.230 (extension of time).

The references to a "hearing" include an informal hearing where appropriate.

§ 642.360. Amended and supplemental pleadings

642.360. (a) At any time before commencement of the hearing a party may amend or supplement a pleading or response. After commencement of the hearing a party may amend or supplement a pleading or response in the discretion of the presiding officer, including an amendment to conform to proof at the hearing.

(b) An amended or supplemental pleading or response shall be served on all parties.

(c) If an amended or supplemental pleading or response presents a new issue, the opposing party shall be given a reasonable opportunity to prepare a case. Any new matter is considered controverted without further pleading or response, and any objection to the amended or supplemental pleading or response may be made orally and shall be noted in the record.

(d) A reference in this part to an agency pleading or response includes an amended or supplemental pleading or response.

Comment. Section 642.360 supersedes former Sections 11507 and Section 11516. It is broadened to permit amendment of responses as well as agency pleadings, but is narrowed so that an amendment is subject to the presiding officer's discretion after commencement of the hearing. *Cf.* Code Civ. Proc. § 464 (supplemental pleading alleges facts material to case occurring after former pleading).

Article 4. Setting Matter for Hearing

§ 642.410. Time and place of hearing

642.410. (a) The agency initiating the adjudicative proceeding shall determine the time and place of the hearing. The hearing shall not be held before expiration of the time within which the person to which the agency action is directed is entitled to respond.

(b) The agency shall consult the Office of Administrative Hearings and the time and place of hearing are subject to the availability of its staff, except for an adjudicative proceeding that by statute is exempt from the requirement that it be conduced by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 642.410 is drawn from former Sections 11508 and 11509.

§ 642.420. Continuances

642.420. (a) The presiding officer may grant a continuance for good cause.

(b) A party shall apply for a continuance within 15 days after the party discovered or reasonably should have discovered the event or occurrence that establishes good cause for the continuance. A continuance may be granted for good cause after the 15 days have elapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

Comment. Section 642.420 supersedes former Section 11524. The section vests continuance decisions in the presiding officer, whether or not employed by the Office of Administrative Hearings, and revises the times from 10 working days to 15 calendar days. The section eliminates the provision for special judicial review of denial of a continuance request; this matter is subject to judicial review at the same time and in the same manner as other disputed matters.

§ 642.430. Venue and change of venue

642.430. (a) The hearing shall be held in the following location:

(1) City and County of San Francisco, if the transaction occurred or the person to which the agency action is directed resides or is located within the First or Sixth Appellate District.

(2) County of Los Angeles, if the transaction occurred or the person to which the agency action is directed resides or is located within the Second Appellate District or within the Fourth Appellate District other than the County of Imperial or San Diego.

(3) County of Sacramento, if the transaction occurred or the person to which the agency action is directed resides or is located within the Third or Fifth Appellate District.

(4) County of San Diego, if the transaction occurred or the person to which the agency action is directed resides or is located within the Fourth Appellate District in the County of Imperial or San Diego.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of residence or location of the person to which the agency action is directed, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the person to which the agency action is directed resides or is located.

(3) The parties may select any place within the state by agreement.

(c) The person to which the agency action is directed may move for, and the presiding officer in its discretion may grant or deny, a change in the place of the hearing.

Comment. Section 642.330 is drawn from former Section 11508.

Subdivision (a)(4) recognizes creation of a branch of the Office of Administrative Hearings in San Diego.

Subdivision (c) is new. It codifies practice authorizing a motion for change of venue. See 1 Ogden, Cal. Public Agency Prac. § 33.02[4][d] (1991). Grounds for change of venue include selection of an improper county and promotion of convenience of witness and ends of justice. *Cf.* Code Civ. Proc. § 397.

§ 642.440. Notice of hearing

642.440. (a) The agency shall serve a notice of hearing on all parties at least 15 days before the hearing.

(b) The notice of hearing shall be substantially in the following form and may include other information:

> A hearing will be held before [here insert name of agency] at [here insert place of hearing] on [here insert date of hearing], at the hour of, on the issues stated in the agency pleading served on you.
>
> The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the presiding officer within 15 days after you discover the good cause. Failure to notify the presiding officer within 15 days will deprive you of a postponement.
>
> You may be present at the hearing. You have the right to be represented by an attorney or other authorized representative at your own expense. You are not entitled to the appointment of an attorney or other authorized representative to represent you at public expense. You are entitled to represent yourself without an attorney.
>
> Unless the hearing is an informal hearing:
>
> You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents, or other things by applying to [here insert appropriate office of agency] or the presiding officer, or by your attorney of record.

Comment. Section 642.440 is drawn from former Sections 11509 and 11505, with an increase in time from 10 to 15 days. If notice of hearing is sent by mail or other means, it must be sent at least 20 days before the hearing date. Section 613.230 (extension of time). Proof of service by mail may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ. Proc. § 1013a.

The person to which the agency action is directed may be represented by an attorney or, in some circumstances, another authorized representative. See Sections 613.310-613.330 (representation of parties).

For limitations on procedures in an informal hearing, see Section 632.030 (procedure for informal hearing).

CHAPTER 3. PRESIDING OFFICER

Article 1. Designation of Presiding Officer

§ 643.110. OAH administrative law judge as presiding officer

643.110. Unless an adjudicative proceeding is exempt by statute from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings, the following provisions apply:

(a) The presiding officer shall be an administrative law judge assigned by the director of the Office of Administrative Hearings.

(b) In the discretion of the agency head, the administrative law judge may hear the case alone or the agency head may hear the case with the administrative law judge.

(c) If the administrative law judge hears the case alone, the administrative law judge shall exercise all powers relating to the conduct of the hearing.

(d) If the agency head hears the case with the administrative law judge:

(1) The administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency head on matters of law.

(2) The agency head shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge.

(3) The agency head shall issue a final decision as provided in Section 649.110. The administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency head. No agency member who did not hear the evidence shall vote.

(4) Notwithstanding any other provision of this subdivision, if after the hearing has commenced a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall deliver a proposed decision to the agency head as provided in Section 649.110.

Comment. Section 643.110 restates the substance of the first sentence of former Section 11512(a). It recognizes that a number of statutes exempt hearings from the requirement that the hearings be conducted by an administrative law judge employed by the Office of Administrative Hearings. Assignment of an administrative law judge under subdivision (a) is governed by Section 636.150 (Office of Administrative Hearings).

Subdivision (b) restates the second sentence of former Section 11512(a).

Subdivision (c) restates the second sentence of former Section 11512(b).

Subdivisions (d)(1) and (2) restate the first sentence of former Section 11512(b). Subdivision (d)(3) restates former Section 11517(a) with the addition of a sentence that makes clear the agency head may issue a final decision in the proceeding. Subdivision (d)(4) restates former Section 11512(e).

§ 643.120. Designation of presiding officer by agency head where exempt from OAH

643.120. If an adjudicative proceeding is exempt by statute from the requirement that it be conducted by an administrative law judge employed by the

Office of Administrative Hearings, any one or more of the following persons may, in the discretion of the agency head, be the presiding officer:

(a) The agency head.

(b) An agency member.

(c) An administrative law judge assigned by the director of the Office of Administrative Hearings.

(d) Another person designated by the agency head.

Comment. Section 643.120 is drawn from 1981 Model State Act § 4-202(a). It uses the term "presiding officer" to refer to the one or more persons who preside over a hearing. If the presiding officer is more than one person, as for example when a multi-member agency sits en banc, one of the persons may serve as spokesperson, but all persons collectively are regarded as the presiding officer. See also Section 13 (singular includes plural).

Assignment of an administrative law judge under subdivision (c) is pursuant to Section 636.150 (assignment of administrative law judges). Discretion of the agency head to designate "another person" to serve as presiding officer under subdivision (d) is subject to Section 643.320 (separation of functions).

One consequence of determining who shall preside is provided in Sections 649.110 and 649.210. Under Section 649.110 (proposed and final decisions), if the agency head presides, the agency head shall issue a final decision; if any other presiding officer presides, a proposed decision must be issued. Section 649.210 (availability and scope of review) establishes the general appealability of proposed and final decisions to the agency head.

For a statutory exception to the right of the agency head to designate the presiding officer, see Section 643.110 (OAH administrative law judge as presiding officer).

§ 643.130. Substitution of presiding officer

643.130. (a) If a substitute is required for a presiding officer who is disqualified or is unavailable for any other reason, the substitute shall be appointed by the appointing authority.

(b) A substitute appointed under this section is subject to the same qualifications as an original presiding officer.

(c) An action taken by a substitute appointed under this section is as effective as if taken by an original presiding officer.

Comment. Section 643.130 is drawn from 1981 Model State APA § 4-202(e)-(f). This provision also applies to the reviewing authority. Section 649.230 (review procedure). The section only applies where a substitute is "required", i.e., is necessary because the presiding officer is otherwise unable to act, for example because of lack of a quorum.

In cases where there is no appointing authority, e.g., the presiding officer is an elected official, this section provides for no appointment of a substitute, and the "rule of necessity" applies. *Cf.* former Section 11512(c) (no agency member subject to disqualification if disqualification would prevent existence of quorum qualified to act).

Article 2. Disqualification

§ 643.210. Grounds for disqualification of presiding officer

643.210. (a) The presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this part.

(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:

(1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.

(2) Has experience, technical competence, or specialized knowledge of or has in any capacity expressed a view on a legal, factual, or policy issue presented in the proceeding.

(3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

(4) Is subject to the authority, direction, or discretion of or is assisted or advised by a person who has served as, investigator, prosecutor, or advocate in the proceeding, to the extent those circumstances are not prohibited by Article 3 (commencing with Section 643.320) (separation of functions).

Comment. Section 643.210 supersedes former Section 11512(c). Section 643.210 applies whether the presiding officer serves alone or with others. Other causes of disqualification provided in this part include receipt of ex parte communications. Section 648.550 (disqualification of presiding officer). For separation of functions requirements, see Section 643.320. This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Subdivision (a) specifies grounds for disqualification drawn from 1981 Model State APA § 4-202(b).

Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of judges). Although subdivision (b)(2) provides that expression of a view on a legal, factual, or policy issue in the proceeding does not in itself disqualify the presiding officer under Section 643.210, disqualification in such a situation might occur under Section 643.320 (separation of functions).

§ 643.220. Self disqualification

643.220. (a) The presiding officer shall disqualify himself or herself and withdraw from a proceeding in which there are grounds for disqualification.

(b) The parties may waive disqualification under subdivision (a) by a writing that recites the basis for disqualification. The waiver is effective only when signed by all parties, accepted by the presiding officer, and included in the record.

Comment. Section 643.220 is drawn from the first sentence of former Section 11512(c) and from Code of Civil Procedure Section 170.3(b)(1). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

A waiver of disqualification under subdivision (b) is a voluntary relinquishment of rights by the parties. It should be noted that the waiver may be signed by the attorney or other authorized representative of a party. Section 613.340 (authority of attorney or other representative of party). The presiding officer need not accept a waiver; the waiver is effective only if accepted by the presiding officer.

§ 643.230. Procedure for disqualification of presiding officer

643.230. (a) A party may request disqualification of the presiding officer by filing an affidavit within 10 days after receipt of notice of the presiding officer's identity or within 10 days after discovering facts establishing grounds for disqualification, whichever is later. The affidavit shall state with particularity the grounds of the request for disqualification of the presiding officer.

(b) The presiding officer whose disqualification is requested shall determine whether to grant the request. If the presiding officer is more than one person, the person whose disqualification is requested shall not participate in the determination.

(c) A determination not to grant the disqualification request shall state facts and reasons for the determination.

(d) The determination of the disqualification request is subject to administrative and judicial review at the same time, in the same manner, and to the same extent as other determinations of the presiding officer in the proceeding.

Comment. Section 643.230 supersedes former Section 11512(c). It is drawn from 1981 Model State APA § 4-202(c)-(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Article 3. Separation of Functions

§ 643.320. When separation required

643.320. (a) Except to the extent provided in Section 643.330:

(1) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise the presiding officer in the same proceeding.

(2) A person who is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer in the same proceeding.

(b) This section does not apply to issuance, denial, revocation, or suspension of a driver's license pursuant to Division 6 (commencing with Section 12500) of the Vehicle Code.

Comment. Section 643.320 is drawn from 1981 Model State APA § 4-214(a)-(b). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

In subdivision (a), the term "a person who has served" in any of the capacities mentioned is intended to mean a person who has personally carried out the function, and not one who has merely supervised or been organizationally connected with a person who has personally carried out the function. The separation of functions requirements are intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case. For this reason also, a staff member who plays a meaningful but neutral role without becoming an adversary would not be barred by the limitations of subdivision (a).

The separation of functions requirements of subdivision (a) are not limited to agency personnel, but include participants in the proceeding not employed by the agency. A deputy attorney general who prosecuted the case at the administrative trial level, for example, would be precluded from advising the reviewing authority at the administrative review level, except with respect to settlement matters. Section 643.330 (b)(4).

While subdivision (a) precludes an adversary from assisting or advising a presiding officer, it does not preclude a presiding officer from assisting or advising an adversary. Thus it would not prohibit an agency head from communicating to an adversary that a particular case should be settled or dismissed.

Subdivision (a)(2), unlike 1981 Model State APA § 4-214(b), does not preclude a subordinate of an adversary from assisting or advising the presiding officer.

Subdivision (b) recognizes the personnel problem faced by the Department of Motor Vehicles due to the large volume of drivers' licensing cases. Although subdivision (b) makes separation of powers requirements inapplicable in drivers' licensing cases, the separation of functions requirements remain applicable in other Department of Motor Vehicle hearings, including schoolbus operation certificate hearings.

§ 643.330. When separation not required

643.330. (a) Unless a party demonstrates other statutory grounds for disqualification:

(1) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise the presiding officer in the same proceeding.

(2) A person may serve as presiding officer at successive stages of the same adjudicative proceeding.

(3) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding may advise the presiding officer concerning a settlement proposal advocated by the person in the same proceeding.

(4) A person who has served as investigator or advocate in an adjudicative proceeding may serve as a supervisor of the presiding officer or assist or advise the presiding officer in the same proceeding if the proceeding is nonprosecutorial in character and the service, assistance, or advice occurs more than one year after the time the person served as investigator or advocate, provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice.

(5) A person who has served as investigator or advocate in an adjudicative proceeding may give advice to the presiding officer concerning a technical issue involved in the same proceeding if the proceeding is nonprosecutorial in character and the advice concerning the technical issue is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties have an opportunity to comment on the advice.

(b) Nothing in this section authorizes a communication between the presiding officer and another person to the extent the communication is otherwise prohibited by Section 648.520.

Comment. Section 643.330 is drawn from 1981 Model State APA § 4-214(c)-(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Subdivisions (a)(1) and (2), dealing with the extent to which a person may serve as presiding officer at different stages of the same proceeding, should be distinguished from Section 648.520, which prohibits certain ex parte communications. The policy issues in Section 648.520 regarding ex parte communication between two persons differ from the policy issues in subdivisions (a)(1) and (2) regarding the participation by one individual in two stages of the same proceeding. There may be other grounds for disqualification, however, in the event of improper ex parte communications. Subdivision (b); Section 648.550. See also Section 643.210 (grounds for disqualification of presiding officer).

Subdivision (a)(3), permitting an investigator, prosecutor, or advocate to advise the presiding officer regarding a settlement proposal, is limited to advice in support of the proposed settlement; the insider may not use the opportunity to argue against a previously agreed-to settlement. *Cf.* Alhambra City and High School Districts (1986) PERB Decision No. 560 [10 PERC ¶ 17046]. Insider access is permitted here in support of public policy favoring settlement, and because of the consonance of interest of the parties in this situation.

Subdivisions (a)(4) and (5) apply to nonprosecutorial types of administrative adjudications, such as individualized ratemaking and power plant siting decisions. The subdivisions recognize that the length and complexity of many cases of this type may as a practical matter make it impossible for an agency to adhere to the separation of functions requirements, given limited staffing and personnel. Subdivision (a)(4) excuses compliance with the separation of functions requirements in such a case if more than one year has elapsed between the contrary functions. Subdivision (a)(5) recognizes such an adjudication may require advice from a person with special technical knowledge whose advice would not otherwise be available to the presiding officer under standard separation of functions doctrine.

§ 643.340. Staff assistance for presiding officer

643.340. A presiding officer may receive assistance from a staff assistant if the assistant does not (1) receive ex parte communications of a type that the presiding officer would be prohibited from receiving or (2) furnish, augment, diminish, or modify the evidence in the record.

Comment. Section 643.340 is drawn from 1981 Model State APA § 4-213(b). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

CHAPTER 4. INTERVENTION

§ 644.110. Intervention

644.110. The presiding officer shall grant a motion for intervention if all of the following conditions are satisfied:

(a) The motion is submitted in writing to the presiding officer, with copies served on all parties named in the notice of the hearing.

(b) The motion is made as early as practicable in advance of the hearing. If there is a prehearing conference, the motion shall be made in advance of the prehearing conference and shall be resolved at the prehearing conference.

(c) The motion states facts demonstrating that the applicant's legal rights, duties, privileges, or immunities may be substantially affected by the proceeding or that the applicant qualifies as an intervenor under a statute or regulation.

(d) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.

Comment. Section 644.110 is drawn from 1981 Model State APA § 4-209(a). It provides that the presiding officer must grant the motion to intervene if a party satisfies the standards of the section. Subdivision (c) confers standing on an applicant to intervene on demonstrating that the applicant's "legal rights, duties, privileges, or immunities may be substantially affected by the proceeding". However, subdivision (d) imposes the further limitation that the presiding officer may grant the motion for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the

impact of the proceedings on the legal rights, etc. of the applicant for intervention (subdivision (c)) against the interests of justice and the need for orderly and prompt proceedings (subdivision (d)).

§ 644.120. Conditions on intervention

644.120. If an applicant qualifies for intervention, the presiding officer may impose conditions on the intervenor's participation in the proceedings, either at the time that intervention is granted or at a subsequent time. Conditions may include the following:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(b) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.

(c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.

(d) Limiting or excluding the intervenor's participation in settlement negotiations.

Comment. Section 644.120 is drawn from 1981 Model State APA § 4-209(c). This section, authorizing the presiding officer to impose conditions on the intervenor's participation in the proceeding, is intended to permit the presiding officer to facilitate reasonable involvement of intervenors without subjecting the proceeding to unreasonably burdensome or repetitious presentations.

§ 644.130. Order granting, denying, or modifying intervention

644.130. (a) As early as practicable in advance of the hearing the presiding officer shall issue an order granting or denying each motion for intervention, specifying any conditions, and briefly stating the reasons for the order.

(b) The presiding officer may modify the order at any time, stating the reasons for the modification.

(c) The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the applicant for intervention and to all parties.

Comment. Section 644.130 is drawn from 1981 Model State APA § 4-209(d). By requiring advance notice of the presiding officer's order granting, denying, or modifying intervention, this section is intended to give the parties and the applicants for intervention an opportunity to prepare for the adjudicative proceeding.

§ 644.140. Intervention determination nonreviewable

644.140. Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made under this chapter by the presiding officer in the presiding officer's sole discretion based on the knowledge and judgment of the presiding officer at that

time, and the presiding officer's determination is not subject to administrative or judicial review.

Comment. Section 644.140 is new.

§ 644.150. Participation short of intervention

644.150. Nothing in this chapter precludes an agency from adopting a regulation that permits participation by a person short of intervention as a party, subject to Article 5 (commencing with Section 648.510) of Chapter 8 (ex parte communications).

Comment. Section 644.150 recognizes that there are ways whereby an interested person can have an impact on an ongoing adjudication without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the addition of more parties. Agency regulations may provide, for example, for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party.

CHAPTER 5. DISCOVERY

Article 1. General provisions

§ 645.110. Application of chapter

645.110. This chapter provides the exclusive right to and method of discovery in a proceeding governed by this part.

Comment. Section 645.110 supersedes former Section 11507.5 and broadens it to apply to all adjudicative proceedings covered by this part. The civil discovery provisions of the Code of Civil Procedure are inapplicable to this part except to the extent a provision of this part incorporates them.

§ 645.120. Discovery of evidence of sexual conduct

645.120. (a) This section is intended only to limit the scope of discovery. It is not intended to affect the methods of discovery allowed under this chapter.

(b) In a proceeding under subdivision (i) or (j) of Section 12940 or under Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided in Section 648.470 (evidence of sexual conduct).

Comment. Section 645.120 supersedes subdivision (g) of former Section 11507.6.

§ 645.130. Depositions

645.130. (a) A party may, by petition as provided in this section, request an order that the testimony of a material witness residing within or without the state be taken by deposition in the manner prescribed by law for depositions in civil actions.

(b) The petition shall be verified, shall request an order that the witness appear and testify before an officer named in the petition for that purpose, and shall state all of the following:

(1) The nature of the pending proceeding.

(2) The name and address of the witness whose testimony is requested.

(3) A showing of the materiality of the testimony of the witness.

(4) A showing that the witness will be unable or can not be compelled to attend the hearing.

(c) The applicant shall serve notice of hearing and a copy of the petition on the other parties to the proceeding at least 10 days before the hearing.

(d) If the witness resides within the state, the petition shall be made to, and an order may be issued by, the presiding officer or, if a presiding officer has not been appointed, the agency. If the witness resides without the state, the petition shall be made to, and an order may be issued by, the agency, which shall obtain an order of the superior court to that effect either in the county where the proceeding is conducted or the County of Sacramento.

Comment. Section 645.130 supersedes former Section 11511. The section authorizes the presiding officer, if one has been appointed, to order a deposition where the witness resides within the state. The section also requires notice to the other parties of the hearing on the petition. See also Section 613.230 (extension of time).

Article 2. Discovery

§ 645.210. Time and manner of discovery

645.210. (a) After commencement of a proceeding, a party, on written request to another party, before the hearing and within 30 days after service on the party of the agency pleading or within 15 days after service on the party of an additional or supplemental pleading, is entitled to discovery to the extent provided in this article.

(b) Notwithstanding a party's compliance with a request for discovery under this article, the party has a continuing duty to disclose and make available to the requesting party any supplemental matter within the scope of the request for discovery immediately on obtaining knowledge, possession, custody, or control of the matter.

Comment. Subdivision (a) of Section 645.210 supersedes the introductory portion of the first paragraph of former Section 11507.6. Subdivision (b) is new. For the times within a party must respond to a discovery request, see Article 3 (commencing with Section 645.310 (compelling discovery).

§ 645.220. Discovery of witness list

645.220. A party requesting discovery under this article is entitled to obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing.

Comment. Section 645.220 supersedes clause (1) of the first paragraph of former Section 11507.6. For the times within a party must respond to a discovery request, see Article 3 (commencing with Section 645.310 (compelling discovery).

§ 645.230. Discovery of statements, writings, and reports

645.230. (a) As used in this section, "statement" includes all of the following:

(1) A written statement by a person signed or otherwise authenticated by the person.

(2) A stenographic, mechanical, electrical, or other recording or transcript of an oral statement by a person.

(3) A written report or summary of an oral statement by a person.

(b) A party requesting discovery under this article is entitled to inspect and make a copy of any of the following in the possession or custody or under the control of another party:

(1) A statement of a witness then proposed to be called by the party or of any other person, including a party or the complainant, having personal knowledge of the acts, omissions, or events that are the basis for the proceeding.

(2) All writings, including, but not limited to, reports of mental, physical, and blood examinations, and things that the party then proposes to offer in evidence.

(3) Any other writing or thing that is relevant.

(4) An investigative report made by or on behalf of the party pertaining to the subject matter of the proceeding, to the extent that the report (i) contains the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions, or events that are the basis for the proceeding, or (ii) reflects matters perceived by the investigator in the course of the investigation, or (iii) contains or includes by attachment any statement or writing or summary of a statement or writing described in this section.

(c) Nothing in this section authorizes the inspection or copying of any writing or thing that is privileged from disclosure by law or otherwise made confidential or protected as an attorney's work product.

Comment. Section 645.230 supersedes clause (2) of the first paragraph of, subdivisions (a)-(f) of, and the second and third paragraphs of, former Section 11507.6. See also Section 610.290 ("agency pleading" defined).

Subdivision (b)(1) generalizes specific provisions of former law that allowed discovery of both (1) a statement of a person, other than the person to which the agency action is directed, named in the agency pleading, when it is alleged that an act or omission as to the person is the basis for the adjudicative proceeding, and (2) a statement pertaining to the subject matter of the proceeding made by a party to another party or person. This generalization is for drafting convenience and is not intended to repeal any authority for discovery that existed under former law; that authority is continued in the new provision.

Although subdivision (b)(3) permits discovery of anything that is relevant, it should be noted that Section 648.420 provides the presiding officer discretion to exclude evidence.

For the times within a party must respond to a discovery request, see Article 3 (commencing with Section 645.310) (compelling discovery).

Article 3. Compelling Discovery

§ 645.310. Time for response to discovery request

645.310. A party shall respond to a request for discovery within 20 days after service of the request.

Comment. Section 645.310 is new. If the request is served by mail or other means, the party has 25 days after the date of sending in which to respond. Section 613.230 (extension of time).

§ 645.320. Motion to compel discovery

645.320. (a) If a party fails to respond to a request for discovery within the time provided in Section 645.310, the party making the request may make a motion to the presiding officer to compel discovery.

(b) A motion to compel discovery shall be made and notice of motion served on the party within 15 days after expiration of the time provided in Section 645.310, or if the party evidences refusal to respond before expiration of the time provided in Section 645.310, within 15 days after the evidence of refusal.

(c) The motion shall state facts showing the party's failure or refusal to comply with the request for discovery, a description of the matter sought to be discovered, the reason the matter is discoverable under this chapter, that a reasonable and good faith attempt to contact the party for an informal resolution of the issue has been made, and the ground of the party's refusal so far as known to party making the request.

Comment. Section 645.320 supersedes subdivision (a) and a portion of subdivision (b) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.330. Lodging matters with presiding officer

645.330. Where the matter sought to be discovered is under the custody or control of the opposing party and the opposing party asserts that the matter is not discoverable or is privileged against disclosure under this chapter, the presiding officer may order lodged with it matters provided in, and examine the matters in accordance with the provisions of, subdivision (b) of Section 915 of the Evidence Code.

Comment. Section 645.330 supersedes subdivision (e) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.340. Hearing

645.340. (a) The hearing on the motion to compel discovery shall be within 15 days after the motion is made, or a later time that the presiding officer may on its own motion for good cause determine. The party against which the motion is made may file an opposition to the motion before or at the time of the hearing.

(b) The presiding officer shall decide the case on the matters examined by the presiding officer in camera, the papers filed by the parties, and oral argument and additional evidence that the presiding officer allows.

(c) The presiding officer shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the party requesting discovery, whether the granting of the motion will delay the commencement of the hearing on the date set, and the possible prejudice to any party.

Comment. Section 645.340 supersedes a portion of subdivision (b) and subdivision (f) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

§ 645.350. Order compelling discovery

645.350. (a) Unless otherwise stipulated by the parties, the presiding officer shall no later than 15 days after the hearing make its order denying or granting the motion.

(b) The order of the presiding officer shall be in writing setting forth the matters the party requesting discovery is entitled to discover under this chapter.

(c) The presiding officer shall serve the order on the parties. Where the order grants the motion in whole or in part, the order does not become effective until 10 days after the date the order is served on the party. Where the order denies relief to the party requesting discovery, the order is effective on the date it is served on the party.

Comment. Section 645.350 supersedes subdivision (g) of former Section 11507.7. Under this article proceedings to compel discovery are before the presiding officer rather than the superior court.

Article 4. Subpoenas

§ 645.410. Subpoena authority

645.410. Subpoenas and subpoenas duces tecum may be issued under this article for attendance at the hearing and for production of documents at any reasonable time and place or at the hearing.

Comment. Section 645.410 supersedes a portion of former Section 11510. This article gives all adjudicating agencies, and attorneys for parties, subpoena power. See Section 645.420 (issuance of subpoena). The Coastal Commission previously lacked statutory subpoena power. This section also broadens former law to allow a subpoena duces tecum to provide documents at any reasonable time and place rather than only at the hearing.

This article incorporates privacy protections from civil practice. Section 645.420(a).

§ 645.420. Issuance of subpoena

645.420. (a) Subpoenas and subpoenas duces tecum may be issued by the agency, presiding officer, or attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure.

(b) The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure.

(c) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

Comment. Section 645.420 restates a portion of former Section 11510, and expands it to include issuance by an attorney and to incorporate civil practice privacy protections. See Code Civ. Proc. §§ 1985-1985.4. See also Sehlmeyer v. Dept. of General Services, 21 Cal. Rptr. 2d 840 (1993). For enforcement of a subpoena, see Section 648.610.

§ 645.430. Motion to quash

645.430. (a) An objection to the terms of a subpoena or a subpoena duces tecum, including a motion to quash, may be reasonably made by a party.

(b) The objection shall be resolved by the presiding officer on terms and conditions that the presiding officer declares. The presiding officer may make another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands including violations of the right to privacy.

(c) A subpoena or a subpoena duces tecum issued by the agency on its own motion may be quashed by the agency.

Comment. Section 645.430 addresses matters not previously covered by statute but covered by regulation in some agencies. See, e.g., 20 Cal. Code Regs. § 61 (Public Utilities Commission).

§ 645.440. Witness fees

645.440. A witness appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive for the appearance the following mileage and fees, to be paid by the party on whose motion the witness is subpoenaed:

(a) The same mileage allowed by law to a witness in a civil case.

(b) The same fees allowed by law to a witness in a civil case. This subdivision does not apply to an officer or employee of the state or a political subdivision of the state.

Comment. Section 645.440 restates a portion of former Section 11510. Its coverage is extended to a subpoena duces tecum as well as a subpoena, and is conformed to the mileage and fees applicable in civil cases. See Sections 68093-68098 (mileage and fees in civil cases).

CHAPTER 6. PREHEARING AND SETTLEMENT CONFERENCES

Article 1. Prehearing Conference

§ 646.120. Conduct of prehearing conference

646.120. (a) On motion of a party or by order of the presiding officer, the presiding officer may conduct a prehearing conference.

(b) The presiding officer shall set the time and place for the prehearing conference, and the agency shall give reasonable written notice to all parties. The notice shall inform the parties that at the prehearing conference the proceeding may be converted into an informal hearing for disposition of the matter.

(c) The presiding officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the

conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

(d) At the prehearing conference the proceeding may be converted into an informal hearing for disposition of the matter as provided in this part. The notice of the informal hearing shall state the date of the hearing.

(e) A party who fails to attend or participate in a conference may be held in default under this part. The notice of the prehearing conference shall so inform the parties.

Comment. Subdivisions (a) and (b) of Section 646.120 supersede former Section 11511.5(a). See also Section 613.230 (extension of time).

Subdivision (c) is a procedural innovation drawn from 1981 Model State APA § 4-205(a) that allows the presiding officer to conduct all or part of the prehearing conference by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (c) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceedings in the physical presence of all participants.

Subdivision (d) is drawn from 1981 Model State APA § 4-204(3)(vii).

Subdivision (e) is drawn from 1981 Model State APA § 4-204(3)(viii). For default procedures, see Section 648.130.

§ 646.130. Subject of prehearing conference

646.130. A prehearing conference may deal with one or more of the following matters:

(a) Exploration of settlement possibilities.

(b) Preparation of stipulations.

(c) Clarification of issues.

(d) Rulings on identity and limitation of the number of witnesses.

(e) Objections to proffers of evidence.

(f) Order of presentation of evidence and cross-examination.

(g) Rulings regarding issuance of subpoenas and protective orders.

(h) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(i) Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

(j) Motions for intervention.

(k) Any other matters that promote the orderly and prompt conduct of the hearing.

Comment. Section 646.130 supersedes former Section 11511.5(b).

Subdivision (i) is new. If a party has not availed itself of discovery within the time periods provided by Chapter 5 (commencing with Section 645.110), it should not be permitted to use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of information concerning evidence to be offered at the hearing.

Subdivision (j) implements Section 644.110 (intervention).

§ 646.140. Prehearing order

646.140. The presiding officer shall issue a prehearing order incorporating the matters determined at the prehearing conference. The presiding officer may direct one or more of the parties to prepare the prehearing order.

Comment. Section 646.140 supersedes former Section 11511.5(c).

Article 2. Settlement Conference

§ 646.210. Settlement

646.210. (a) The parties to an adjudicative proceeding may settle the matter on any terms the parties determine are appropriate. This subdivision applies:

(1) After issuance of an agency pleading in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned.

(2) Before or after issuance of an agency pleading in a case other than a case described in paragraph (1).

(b) This section is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement.

Comment. Subdivision (a) of Section 646.210 codifies the rule in Rich Vision Centers, Inc. v. Bd. of Med. Exam., 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983). It also makes clear that an agency can settle a case without filing an agency pleading, except in a licensing disciplinary case. This provision is subject to a specific statute to the contrary governing the matter. See, e.g., Labor Code § 5001 (workers' compensation settlement must be approved by board or workers' compensation judge).

§ 646.220. Mandatory settlement conference

646.220. (a) The presiding officer may order the parties to attend and participate in a settlement conference.

(b) The presiding officer at the settlement conference shall be different from the presiding officer at the hearing, except that if the adjudicative proceeding is not required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the presiding officer at the settlement conference may, but need not, be different from the presiding officer at the hearing.

(c) The presiding officer shall set the time and place for the settlement conference, and the agency shall give reasonable written notice to all parties.

(d) The presiding officer may conduct all or part of the settlement conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

(e) A party who fails to attend or participate in a settlement conference may be held in default under this part. The notice of the settlement conference shall so inform the parties.

Comment. Under Section 646.220 a settlement conference may, but need not, be separate from the prehearing conference (at which exploration of settlement issues may occur); the conduct of the settlement conference parallels that of the prehearing conference. See Sections 646.120, 646.130 and Comments (prehearing conference).

Attendance and participation in the settlement conference is mandatory. For default procedures, see Section 648.130.

An agency may, but is not required to, put in place a system of settlement judges, whereby a judge of comparable status to the presiding officer who will hear the case is assigned to help mediate a settlement. Separate settlement judges are required in settlement conferences before the Office of Administrative Hearings.

See also Section 613.230 (extension of time).

§ 646.230. Confidentiality of settlement communications

646.230. Notwithstanding any other statute, no evidence of an offer of compromise or settlement made in settlement negotiations under this article is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

Comment. Section 646.230 applies notwithstanding Section 648.410 (technical rules of evidence inapplicable). It is drawn from Evidence Code § 1152 (compromise and settlement offers). See Section 647.240 and Comment (confidentiality of communications in alternative dispute resolution).

CHAPTER 7. HEARING ALTERNATIVES

Article 1. [Reserved]

Article 2. Alternative Dispute Resolution

§ 647.210. Application of article

647.210. (a) This article is subject to a statute that requires mediation or arbitration in an adjudicative proceeding.

(b) By regulation an agency may make this article inapplicable.

Comment. Subdivision (a) of Section 647.210 recognizes that some statutes require alternative dispute resolution techniques. See, e.g., [references to be supplied, particularly relating to labor relations disputes].

§ 647.220. ADR authorized

647.220. (a) An agency may, with the consent of all the parties, refer a dispute that is the subject of an adjudicative proceeding for resolution by any of the following means:

(a) Mediation by a neutral mediator.

(b) Binding arbitration by a neutral arbitrator.

(c) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator delivers the award to the agency head a party requests the agency for a de novo adjudicative proceeding. If the decision in the de novo proceeding is not more

favorable to the party electing the de novo proceeding, the party shall pay the costs and fees specified in Section 1141.21 of the Code of Civil Procedure (judicial arbitration) insofar as applicable in the adjudicative proceeding.

Comment. Section 647.220 is new. Under subdivision (a), the mediator may use any mediation technique.

Subdivision (c) parallels the procedure applicable in judicial arbitration. See Code Civ. Proc. §§ 1141.20-1141.21. The costs and fees specified in Section 1141.21 for a civil proceeding may not all be applicable in an adjudicative proceeding, but subdivision (c) requires such costs and fees to be assessed to the extent they are applicable.

§ 647.230. Regulations governing ADR

647.230. (a) The Office of Administrative Hearings shall adopt and promulgate model regulations for dispute resolution under this article. The model regulations govern dispute resolution by an agency under this article, unless by regulation the agency modifies the model regulations or makes the model regulations inapplicable.

(b) The model regulations shall include provisions for selection and compensation of a mediator or arbitrator, qualifications of a mediator or arbitrator, and confidentiality of the mediation or arbitration proceeding.

Comment. Section 647.230 does not require each agency to adopt regulations. The model regulations developed by the Office of Administrative Hearings will automatically govern mediation or arbitration for an agency, unless the agency provides otherwise. The agency may choose to preclude mediation or arbitration altogether. Section 647.210 (application of article).

The Office of Administrative Hearings could maintain a roster of neutral mediators and arbitrators who are available for dispute settlement in all administrative agencies.

§ 647.240. Confidentiality and admissibility of ADR communications

647.240. Notwithstanding any other statute, a communication made in dispute resolution under this article is protected to the following extent:

(a) Anything said, any admission made, and any document prepared in the course of or pursuant to mediation under this division is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative proceeding, civil action, or otherwise. This subdivision does not limit the admissibility of evidence if all parties to the proceedings consent.

(b) No reference to nonbinding arbitration under this division or the evidence produced or any other aspect of the arbitration may be made in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(c) No presiding officer, arbitrator, or mediator is competent to testify in a subsequent administrative or civil proceeding as to a statement, conduct, decision, or order occurring at or in conjunction with the dispute resolution.

Comment. Section 647.240 applies notwithstanding Section 648.410 (technical rules of evidence inapplicable).

Subdivision (a) is analogous to Evidence Code Section 1152.5(a)-(b) (mediation). Subdivision (b) is drawn from Code of Civil Procedure Section 1141.25 (arbitration) and California Rules of Court 1616(c) (arbitration). Subdivision (c) is drawn from Evidence Code Section 703.5.

CHAPTER 8. CONDUCT OF HEARING

Article 1. General Provisions

§ 648.120. Consolidation and severance

648.120. (a) When proceedings that involve a common question of law or fact are pending, the agency or presiding officer on its own motion or on motion of a party may order a joint hearing of any or all the matters at issue in the proceedings. The agency or presiding officer may order all the proceedings consolidated and may make orders concerning the procedure that may tend to avoid unnecessary costs or delay.

(b) The agency or presiding officer on its own motion or on motion of a party, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, may order a separate hearing of any issue, including an issue raised in the response, or of any number of issues.

(c) If the agency and presiding officer make conflicting orders under this section, the agency's order controls.

Comment. Section 648.120 is drawn from Code of Civil Procedure Section 1048. Subdivision (a) is sufficiently broad to enable related cases brought before several agencies to be consolidated in a single proceeding, and to enable an agency to employ class action procedures in the agency's discretion. See also Section 13 (singular includes plural).

§ 648.130. Default

648.130. (a) Failure of the person to which the agency action is directed to serve a response or to appear at a prehearing conference or settlement conference or at the hearing is a default.

(b) If the person to which the agency action is directed defaults:

(1) The default is a waiver of the person's right to a hearing.

(2) The agency may take action based on the person's express admissions or on other evidence. Affidavits may be used as evidence without notice to the respondent.

(3) Where the burden of proof is on the person to establish that the person is entitled to the agency action sought, the agency may act without taking evidence.

(c) Notwithstanding the default of the person to which the agency action is directed, the agency or the presiding officer in its discretion may, before a proposed decision is issued, grant a hearing on reasonable notice to the parties.

(d) Within 7 days after service on the person to which the agency action is directed of a decision based on the person's default, the person may serve a

written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause, including a hearing on the remedy based on a showing by way of mitigation. As used in this subdivision, good cause includes but is not limited to:

(1) Failure of the person to receive notice sent pursuant to Section 613.220.

(2) Mistake, inadvertence, surprise, or excusable neglect.

Comment. Subdivisions (a)-(c) of Section 648.130 are drawn from subdivisions (b) and (d) of former Section 11506, with the addition of the provision enabling the presiding officer to waive a default and requiring reasonable notice, and from former Section 11520. See also Section 613.230 (extension of time). Subdivision (d) is drawn in part from procedures used by the Unemployment Insurance Appeals Board.

§ 648.140. Open hearings

648.140. (a) The hearing is open to public observation except to the extent:

(1) A closed hearing is required in whole or in part by statute or by federal or state constitution.

(2) The presiding officer determines it is necessary to close the hearing in whole or in part to ensure a fair hearing in the circumstances of the particular case.

(b) To the extent a hearing is conducted by telephone, television, or other electronic means, subdivision (a) is satisfied if members of the public have an opportunity (1) at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency, and (2) to be physically present at the place where the presiding officer is conducting the hearing.

Comment. Section 648.140 supplements the Bagley-Keene Open Meeting Act, Government Code §§ 11120-11132. Closure of a hearing should be done only to the extent necessary under this section, taking into account the substantial public interest in open proceedings. It should be noted that under the Open Meeting Law deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session. Section 11126(d). See also Section 610.280 ("agency member" defined).

Subdivision (a) codifies existing practice. See discussion in 1 G. Ogden, Cal. Public Agency Prac. § 37.03 (1991). Statutory protection of trade secrets and other confidential or privileged information is covered by subdivision (a)(1). See, e.g., Evid. Code §§ 1060-1063. Discretion of the presiding officer under subdivision (a)(2) could include such matters as protection of a child witness. *Cf.* Section 648.350 (protection of child witnesses).

Subdivision (b) is drawn in part from 1981 Model State APA § 4-211(6).

§ 648.150. Hearing by electronic means

648.150. (a) The presiding officer may conduct all or part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.

(b) The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party shows that a determination in the proceeding will be based substantially on the credibility of a witness and that a

hearing by telephone, television, or other electronic means will impair a proper determination of credibility.

Comment. Subdivision (a) of Section 648.150 is drawn from 1981 Model State APA § 4-211(4), allowing the presiding officer to conduct all or part of the hearing by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (a) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceeding in the physical presence of all participants.

§ 648.160. Report of proceedings

648.160. (a) Except as provided in subdivision (b), the proceedings at the hearing shall be reported by a stenographic reporter or electronically, in the discretion of the agency.

(b) Notwithstanding an agency's election of electronic reporting of proceedings:

(1) The presiding officer may, if the presiding officer determines electronic reporting will not provide an adequate record of the proceedings, require stenographic reporting.

(2) A party may at the party's own expense require stenographic recording.

Comment. Section 648.160 supersedes former Section 11512(d).

Article 2. Language Assistance

§ 648.210. "Language assistance"

648.210. As used in this article, "language assistance" means oral interpretation or written translation into English of a language other than English or of English into another language for a party or witness who cannot speak or understand English or who can do so only with difficulty.

Comment. Section 648.210 supersedes former Section 11500(g). It extends this article to language translation for witnesses as well as for parties.

§ 648.220. Interpretation for hearing-impaired person

648.220. Nothing in this article limits the application or effect of Section 754 of the Evidence Code to interpretation for a deaf or hard-of-hearing party or witness in an adjudicative proceeding.

Comment. Section 648.220 makes clear that the language assistance provisions of this article are not intended to limit the application to adjudicative proceedings of the provisions of Evidence Code Section 754.

§ 648.230. Application of article

(a) The following state agencies shall provide language assistance in adjudicative proceedings to the extent provided in this article:

Agricultural Labor Relations Board

State Department of Alcohol and Drug Abuse

Athletic Commission

California Unemployment Insurance Appeals Board
Board of Prison Terms
Board of Cosmetology
State Department of Developmental Services
Public Employment Relations Board
Franchise Tax Board
State Department of Health Services
Department of Housing and Community Development
Department of Industrial Relations
State Department of Mental Health
Department of Motor Vehicles
Notary Public Section, Office of the Secretary of State
Public Utilities Commission
Office of Statewide Health Planning and Development
State Department of Social Services
Workers' Compensation Appeals Board
Department of the Youth Authority
Youthful Offender Parole Board
Bureau of Employment Agencies
Board of Barber Examiners
Department of Insurance
State Personnel Board

(b) Nothing in this section prevents an agency other than an agency listed in subdivision (a) from electing to adopt any of the procedures in this article, provided that any selection of an interpreter is subject to Section 648.250.

(c) Nothing in this section prohibits an agency from providing an interpreter during an informal factfinding or informal investigatory hearing.

Comment. Subdivisions (a) and (b) of Section 648.230 restate former Section 11501.5. Subdivision (c) restates a portion of former Section 11500(f).

§ 648.240. Provision for interpreter

648.240. (a) The hearing, or any medical examination conducted for the purpose of determining compensation or monetary award, shall be conducted in the English language.

(b) If a party or the party's witness does not proficiently speak or understand the English language and before commencement of the hearing or medical examination requests language assistance, an agency subject to the language assistance requirement of this article shall provide the party or witness an interpreter.

(c) Except as provided in Section 648.275:

(1) An interpreter used in a hearing shall be certified pursuant to Section 648.250.

(2) An interpreter used in a medical examination shall be certified pursuant to Section 648.255.

Comment. Section 648.240 continues the first three sentences of former Section 11513(d) and extends it to witnesses as well as parties. See Section 648.210 ("language assistance" defined).

§ 648.245. Cost of interpreter

648.245. The cost of providing an interpreter under this article shall be paid by the agency having jurisdiction over the matter if the presiding officer so directs, otherwise the party at whose request the interpreter is provided.

(b) The presiding officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay.

(c) Notwithstanding any other provision of this section, in a hearing before the Workers' Compensation Appeals Board or the Division of Workers' Compensation relating to worker's compensation claims, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Workers' Compensation, as appropriate.

Comment. Section 648.245 continues the fourth sentence of, and the second paragraph of, former Section 11513(d) without substantive change.

§ 648.250. Certification of hearing interpreters

648.250. (a) The State Personnel Board shall establish, maintain, administer, and publish annually an updated list of certified administrative hearing interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to Section 648.260. Any interpreter so listed may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures.

(b) Court interpreters certified pursuant to Section 68562, and interpreters listed on the State Personnel Board's recommended lists of court and administrative hearing interpreters before July 1, 1993, shall be deemed certified for purposes of this section.

Comment. Section 648.250 continues subdivision (e) of former Section 11513 without substantive change.

§ 648.255. Certification of medical examination interpreters

648.255. (a) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of certified medical examination interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to Section 648.260.

(b) Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to Section 648.250 shall be deemed certified for purposes of this section.

Comment. Section 648.255 continues subdivision (f) of former Section 11513 without substantive change.

§ 648.260. Designation of languages for certification

648.260. (a) The State Personnel Board shall designate the languages for which certification shall be established under Sections 648.250 and 648.255. The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages.

(b) The language designations shall be based on the following:

(1) The language needs of non-English-speaking persons appearing before the administrative agencies, as determined by consultation with the agencies.

(2) The cost of developing a language examination.

(3) The availability of experts needed to develop a language examination.

(4) Other information the board deems relevant.

Comment. Section 648.260 continues subdivision (g) of former Section 11513 without substantive change.

§ 648.265. Certification fees

648.265. (a) The State Personnel Board shall establish and charge fees for applications to take interpreter examinations and for renewal of certifications. The purpose of these fees is to cover the annual projected costs of carrying out this article. The fees may be adjusted each fiscal year by a percent that is equal to or less than the percent change in the California Necessities Index prepared by the Commission on State Finance.

(b) Each certified administrative hearing interpreter and each certified medical examination interpreter shall pay a fee, due on July 1 of each year, for the renewal of the certification. Court interpreters certified under Section 68562 shall not pay any fees required by this section.

(c) If the amount of money collected in fees is not sufficient to cover the costs of carrying out this article, the board shall charge and be reimbursed a pro rata share of the additional costs by the state agencies that conduct administrative hearings.

Comment. Section 648.265 continues subdivisions (h) and (i) of former Section 11513 without substantive change.

§ 648.270. Decertification

648.270. The State Personnel Board may remove the name of a person from the list of certified interpreters if any of the following conditions occurs:

(a) The person is deceased.

(b) The person notifies the board that the person is unavailable for work.

(c) The person does not submit a renewal fee as required by Section 648.265.

Comment. Section 648.270 continues subdivision (j) of former Section 11513 without substantive change.

§ 648.275. Unavailability of certified interpreter

648.275. (a) In the event an interpreter certified pursuant to Section 648.250 cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and utilize another interpreter.

(b) In the event an interpreter certified pursuant to Section 648.255 cannot be present at the medical examination, the physician provisionally may utilize another interpreter if that fact is noted in the record of the medical evaluation.

Comment. Section 648.275 continues subdivision (k) of former Section 11513 without substantive change.

§ 648.280. Duty to advise party of right to interpreter

648.280. Every agency subject to the language assistance requirement of this article shall advise each party of the right to an interpreter at the same time that each party is advised of the hearing date or medical examination. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made.

Comment. Section 648.280 continues subdivision (l) of former Section 11513 without substantive change.

§ 648.285. Confidentiality and impartiality of interpreter

648.285. (a) The rules of confidentiality of the agency, if any, that apply in an adjudicative proceeding shall apply to any interpreter in the hearing, whether or not the rules so state.

(b) The interpreter shall not have had any involvement in the issues of the case before the hearing.

Comment. Section 648.285 continues subdivisions (m) and (n) of former Section 11513 without substantive change.

Article 3. Testimony and Witnesses

§ 648.310. Burden of proof

648.310. (a) The proponent of a matter has both the burden of producing evidence and the burden of proof on the matter. Except as provided in subdivision (b), the burden of proof is a preponderance of the evidence.

(b) In an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, the burden of proof is clear and convincing proof unless by regulation the agency provides a different burden.

Comment. Section 648.310 generally codifies case law concerning the burden of proof in adjudicative proceedings. See discussion in 1 G. Ogden, California Public Agency Practice § 39 (1991). As used in this section, "license" includes "certificate". Section 610.360 ("license" defined).

This section is also subject to specific statutes to the contrary. See Section 612.140 (contrary express statute controls).

If a party defaults in a case where the party has the burden of proof, the agency may act without taking evidence. Section 648.130 (default).

§ 648.320. Presentation of testimony

648.320. (a) Each party has the right to do all of the following:

(1) Call and examine witnesses.

(2) Introduce exhibits and examine exhibits introduced by the opposing party.

(3) Cross-examine and confront opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination.

(4) Impeach a witness regardless of which party first called the witness to testify.

(5) Rebut the evidence against the party.

(b) A party or person identified with a party may be called and examined as if under cross-examination by an adverse party at any time during the presentation of evidence by the party calling the witness.

Comment. Section 648.320 supersedes former Sections 11500(f)(2) and 11513(b). Subdivision (b) is drawn from Evidence Code § 776(a).

§ 648.330. Oral and written testimony

648.330. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Any part of the evidence may be received in written form if to do so will expedite the hearing without claim of prejudice to the interests of a party.

(c) Documentary evidence may be received in the form of a copy or excerpt. On request, parties shall be given an opportunity to compare the copy with the original and an excerpt with the complete text if available.

Comment. Subdivision (a) of Section 648.330 restates former Sections 11500(f)(1) and 11513(a).

Subdivision (b) is drawn from 1981 Model State APA § 4-212(d).

Subdivision (c) is drawn from 1981 Model State APA § 4-212(e). It requires that parties be given an opportunity to compare a copy with the original and an excerpt with the complete text, "if available". If the original is not available, the copy or excerpt may still be received in evidence, but its probative effect is likely to be weaker than if the original or complete text were available.

For general provisions on oaths, affirmations, and certification of official acts, see Section 613.120.

§ 648.340. Affidavits

648.340. (a) At any time 15 or more days before a hearing or a continued hearing, a party may serve on the opposing party a copy of an affidavit the party proposes to introduce in evidence, together with a notice substantially in the following form:

The accompanying affidavit of [here insert name of affiant] will be introduced as evidence at the hearing in [here insert title of proceeding]. [Here insert name of affiant] will not be called to testify orally and you will not be entitled to question the affiant unless you notify [here insert name of proponent or proponent's attorney or authorized representative] at [here insert address] that you wish to cross-examine the affiant.

To be effective your request must be sent or delivered to [here insert name of proponent or proponent's attorney or authorized representative] on or before [here insert a date 10 days after the date of sending or delivery of the affidavit to the opposing party].

(b) Unless the opposing party, within ten days after service, serves on the proponent a request to cross-examine the affiant, the opposing party's right to cross-examine the affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally.

(c) If an opportunity to cross-examine an affiant is not given after request to cross-examine is made as provided in this section, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(d) As used in this section, "affidavit" includes declaration under penalty of perjury.

Comment. Section 648.340 restates former Section 11514, except the notice must be served at least 15, rather than ten, days before the hearing, and the opposing party has ten, rather than seven, days to request cross-examination. See also Section 613.230 (extension of time). Subdivision (d) is a specific application of the general rule stated in Code of Civil Procedure Section 2015.5 (affidavit includes declaration under penalty of perjury "under any law of this state").

§ 648.350. Protection of child witnesses

648.350. Notwithstanding any other provision of this part, the presiding officer may conduct the hearing, including the manner of examining witnesses and closing the hearing, in a way that is appropriate to protect a child witness from intimidation or other harm, taking into account the rights of all persons.

Comment. Section 648.350 codifies an aspect of Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). See also Section 648.140(a)(2) (discretion of presiding officer to close hearing in appropriate circumstances).

§ 648.360. Official notice

648.360. (a) Official notice may be taken of any of the following:

(1) A generally accepted technical or scientific matter within the agency's special field.

(2) A fact that may be judicially noticed by the courts of this state.

(b) Official notice may be taken before or after submission of the case for decision. The matters of which official notice is taken shall be noted in, referred to in, or appended to, the record.

(c) All parties present at the hearing shall be notified at the hearing, or before issuance of an initial or final decision, of the matters of which official notice is

taken. A party shall have a reasonable opportunity on request to rebut the officially noticed matters by evidence or by written or oral presentation of authority, the manner of rebuttal to be determined by the agency.

Comment. Section 648.360 supersedes former Section 11515. For matters subject to judicial notice by the courts, see Evidence Code §§ 451-52.

Section 648.360 makes clear that all parties have an opportunity to rebut an officially noticed matter, including the agency that is a party to the adjudicative proceeding. Contrast Harris v. ABC App. Bd., 62 Cal. 2d 589, 595-97, 43 Cal. Rptr. 633 (1965).

Article 4. Evidence

§ 648.410. Technical rules of evidence inapplicable

648.410. (a) Except as provided in this chapter, the hearing need not be conducted in accordance with technical rules relating to evidence and witnesses.

(b) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of the evidence over objection in a civil action.

Comment. Section 648.410 restates the first two sentences of former Section 11513(c). The intent of Section 648.410 is to make available to the fact finder evidence that might not be admissible under evidentiary limitations of civil or criminal cases. Thus, for example, the Evidence Code rules relating to excludability of evidence about prior convictions should not apply automatically in the administrative setting. Contrast Coburn v. State Personnel Board, 83 Cal. App. 3d 801, 148 Cal. Rptr. 134 (1978).

§ 648.420. Discretion of presiding officer to exclude evidence

648.420. The presiding officer in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

Comment. Section 648.420 supersedes the last clause of the first paragraph of former Section 11513(c) (exclusion of irrelevant and unduly repetitious evidence). It is drawn from Evidence Code Section 352.

§ 648.430. Review of presiding officer evidentiary rulings

648.430. A ruling of the presiding officer admitting or excluding evidence is subject to administrative review in the same manner and to the same extent as the presiding officer's proposed decision in the proceeding.

Comment. Section 648.430 is new. It overrules any contrary implication that might be drawn from former Section 11512(b).

§ 648.440. Privilege

648.440. The rules of privilege are effective to the extent that they are otherwise required by statute to be recognized at the hearing.

Comment. Section 648.440 restates the first portion of the last sentence of the first paragraph of former Section 11513(c). Under Division 8 (commencing with Section 900) of

the Evidence Code, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions. See also Evid. Code §§ 901, 910.

§ 648.450. Hearsay evidence and the residuum rule

648.450. (a) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

(b) On judicial review of the decision in the proceeding, a party may object to a finding supported only by hearsay evidence in violation of subdivision (a), whether or not the objection was previously raised in the adjudicative proceeding.

Comment. Subdivision (a) of Section 648.450 restates the third sentence of former Section 11513(c). Subdivision (b) provides an exception to the general requirement of exhaustion of administrative remedies on judicial review.

§ 648.460. Unreliable scientific evidence

648.460. Notwithstanding any other provision of this chapter, evidence based on methods of proof that are not generally accepted as reliable in the scientific community shall be excluded.

Comment. Section 648.460 codifies case law applicable to administrative hearings. Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). This section applies notwithstanding agency rules to the contrary.

§ 648.470. Evidence of sexual conduct

648.470. (a) As used in this section "complainant" means a person claiming to have been subjected to conduct that constitutes sexual harassment, sexual assault, or sexual battery.

(b) Notwithstanding any other provision of this chapter:

(1) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at the hearing unless offered to attack the credibility of the complainant, as provided for under paragraph (2). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(2) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

Comment. Subdivision (a) of Section 648.470 restates former Section 11513(p). Paragraph (b)(1) restates the second paragraph of former Section 11513(c). Paragraph (b)(2) restates former Section 11513(o). This section applies notwithstanding agency rules to the contrary.

Article 5. Ex Parte Communications

§ 648.520. Ex parte communications prohibited

648.520. (a) Except as provided in subdivision (b), while the proceeding is pending there shall be no communication, direct or indirect, between the following persons without notice and opportunity for all parties to participate in the communication:

(1) Between the presiding officer and a party or the attorney or other authorized representative of a party, including an employee of an agency that is a party.

(2) Between the presiding officer and an interested person outside an agency that is a party.

(b) A communication otherwise prohibited by this section is permissible in any of the following circumstances:

(1) The communication is for the purpose of assistance and advice to the presiding officer by an employee of the agency that is a party or the attorney or other authorized representative of the agency, provided the assistance or advice does not violate Section 643.320 (separation of functions).

(2) The proceeding is nonprosecutorial in character, provided the content of the communication is disclosed in the manner prescribed in Section 648.540 and all parties are given an opportunity to comment on it.

(3) The communication is required for the disposition of an ex parte matter specifically authorized by statute.

(4) The communication concerns a matter of procedure or practice that is not in controversy.

Comment. Subdivision (a) of Section 648.520 is drawn from subdivisions (a) and (b) of former Section 11513.5. See also 1981 Model State APA § 4-213(a), (c). This provision also applies to the reviewing authority. Section 649.230 (review procedure). Subdivision (a) applies to communications initiated by the presiding officer as well as communications initiated by others.

Subdivision (a) is not intended to apply to communications made to or by a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, or manner of service. Subdivision (b)(4). Such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case. However, it should be noted that a staff assistant who receives substantive ex parte communications may not aid the presiding officer. Section 643.340 (staff assistance for presiding officer).

Subdivision (a) does not preclude ex parte contacts between the agency head making a decision and any person who presided at a previous stage of the proceeding. This reverses a provision of former Section 11513.5(a).

The reference in subdivision (a)(1) to the attorney or representative of a party is consistent with Section 613.340 (authority of attorney or other representative of party).

The reference in subdivision (a)(2) to an "interested person outside the agency" replaces the former reference to a "person who has a direct or indirect interest in the outcome of the proceeding", and is drawn from federal law. See Federal APA § 557(d)(1)(A); see also PATCO v. Federal Labor Relations Authority, 685 F. 2d 547 (D.C. Cir. 1982) (construing the

federal standard to include person with an interest beyond that of a member of the general public).

Subdivision (b)(1) qualifies the provision of this section that otherwise would preclude a presiding officer from obtaining advice from expert agency personnel even though not involved in the matter under adjudication.

Nothing in this article limits the authority of the presiding officer to conduct an in camera examination of proffered evidence. *Cf.* Section 645.330 (lodging discovery matters with court).

§ 648.530. Prior ex parte communication

648.530. If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication in the manner prescribed in Section 648.540 and all parties shall be given an opportunity to comment on it.

Comment. Section 648.530 is drawn from former Section 11513.5(c), but is limited to communications received during pendency of the proceeding. See also 1981 Model State APA § 4-213(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure). A proceeding is pending on issuance of an agency pleading. Section 642.310 (proceeding commenced by agency pleading).

§ 648.540. Disclosure of ex parte communication received

648.540. (a) A presiding officer who receives a communication in violation of this article shall make all of the following a part of the record of the proceeding:

(1) If the communication is written, the writing and any written response to the communication.

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made, and the identity of each person from which the presiding officer received the communication.

(b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record. A party that requests an opportunity to comment on the communication within ten (10) days after notice of the communication shall be allowed to comment.

Comment. Section 648.540 is drawn from former Section 11513.5(d). This provision also applies to the reviewing authority. Section 649.230 (review procedure). It should be noted that a staff assistant who receives substantive ex parte communications may not aid the presiding officer. Section 643.340 (staff assistance for presiding officer).

See also Section 613.230 (extension of time).

§ 648.550. Disqualification of presiding officer

648.550. Receipt by the presiding officer of a communication in violation of this section may provide a basis for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer.

Comment. Section 648.550 is drawn from former Section 11513.5(e). This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Section 648.550 permits the disqualification of a presiding officer if necessary to eliminate the effect of an ex parte communication. For the disqualification procedure, see Section 643.230.

In addition, this section permits the pertinent portions of the record to be sealed by protective order. The intent of this provision is to remove the improper communication from the view of the successor presiding officer, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review. Issuance of a protective order under this section is permissive, not mandatory, and is therefore within the discretion of a presiding officer who has knowledge of the improper communication.

Article 6. Enforcement of Orders and Sanctions

§ 648.610. Misconduct in proceeding

648.610. A person is subject to the contempt sanction for any of the following in a proceeding before an agency under this part:

(a) Disobedience of or resistance to a lawful order.

(b) Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.

(c) Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following:

(1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding.

(2) Breach of the peace, boisterous conduct, or violent disturbance.

(3) Other unlawful interference with the process or proceedings of the agency.

(d) Violation of the prohibition of ex parte communications under Section 648.520.

(e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer under Chapter 4 (commencing with Section 645.110), or moving, without substantial justification, to compel discovery.

Comment. Section 648.610 restates the substance of a portion of former Section 11525. Subdivision (c) is a clarifying provision drawn from Code of Civil Procedure Section 1209 (contempt of court). Subdivision (d) is new. Subdivision (e) supersedes former Section 11507.7(i).

§ 648.620. Contempt

648.620. (a) The presiding officer or reviewing authority may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted. The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court has jurisdiction of the matter.

(b) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Comment. Section 648.620 restates a portion of former Section 11525 of the Government Code, but vests certification authority in the presiding officer or reviewing authority. For monetary sanctions for bad faith tactics, see Section 648.630. For enforcement of discovery orders, see Sections 645.310-645.360.

§ 648.630. Monetary sanctions for bad faith actions or tactics

648.630. (a) The presiding officer or agency may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

(b) The order, or denial of an order, is subject to administrative and judicial review in the same manner as a decision in the proceeding, and is enforceable by writ of execution, by the contempt sanction, or by other proper process.

Comment. Section 648.630 is new. It permits monetary sanctions against a party (including the agency) for bad faith actions or tactics. Bad faith actions or tactics could include failure or refusal to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer in discovery, or moving to compel discovery, frivolously or solely intended to cause delay. An order imposing sanctions (or denial of such an order) is reviewable in the same manner as administrative decisions generally.

For authority to seek the contempt sanction, see Section 648.620. For enforcement of discovery orders, see Sections 645.310-645.360.

CHAPTER 9. DECISION

Article 1. Issuance of Decision

§ 649.110. Proposed and final decisions

649.110. (a) If the presiding officer is the agency head, the presiding officer shall issue a final decision within 100 days after the case is submitted.

(b) If the presiding officer is not the agency head, the presiding officer shall deliver a proposed decision to the agency head within 30 days after the case is submitted, and make proof of delivery. Failure of the presiding officer to deliver a proposed decision within the time required does not prejudice any rights of the agency in the case.

(c) A proposed decision becomes a final decision at the time provided in Section 649.150.

Comment. Subdivision (a) of Section 649.110 restates the second sentence of former Section 11517(d), with the addition of authority for an agency to provide a different decision period in an exempt proceeding. See also 1981 Model State APA § 4-215(a).

The first sentence of subdivision (b) restates the first sentence of former Section 11517(b). The second sentence makes clear that the agency is not accountable for the presiding

officer's failure to meet required deadlines. Nothing in subdivision (b) is intended to limit the authority of an agency to use its own internal procedures, including internal review processes, in the development of a proposed decision.

A case is submitted for purposes of this section when the hearing record is closed, in the sense that evidence has been taken and briefs submitted, or as otherwise specified in agency regulations.

The time limits in this section may be modified by another statute. See Section 612.140 (contrary express statute controls).

For the form and contents of a decision, whether proposed or final, see Section 649.120.

Either a proposed or final decision may be subject to administrative review. Section 649.210 (availability and scope of review). See also Section 610.310 ("decision" defined). Errors in a final decision may be corrected under Section 649.170 (correction of mistakes in final decision). A proposed decision becomes final unless it is subjected to administrative review under Article 8 (commencing with Section 649.210).

§ 649.120. Form and contents of decision

649.120. (a) A proposed decision or final decision shall be in writing and shall include a statement of the factual and legal basis for the decision as to each of the principal controverted issues.

(b) The statement of the factual basis for the proposed or final decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the proposed or final decision. If the factual basis for the proposed or final decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination.

(c) The statement of the factual basis for the proposed or final decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. Evidence of record may include facts known to the presiding officer and supplements to the record that are made after the hearing, provided the evidence is made a part of the record and that all parties are given an opportunity to comment on it. The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence.

(d) Nothing in this section limits the information that may be contained in a proposed or final decision, including a summary of evidence relied on.

Comment. Section 649.120 supersedes the first two sentences of former Sections 11500(f)(4) and 11518. Under Section 649.120, the form and contents of a proposed decision and final decision are the same. *Cf.* former Section 11517(b) (proposed decision in form that it may be adopted as decision in case).

Subdivision (a) is drawn from the first sentence of 1981 Model State APA § 4-215(c). The decision must be supported by findings that link the evidence in the proceeding to the ultimate decision. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974). The requirement that the decision must include a statement of the basis for the decision is particularly significant when an agency develops new

policy through the adjudication of specific cases rather than through rulemaking. Articulation of the basis for the agency's decision facilitates administrative and judicial review, helps clarify the effect of any precedential decision, see Article 3 (commencing with Section 649.310), and focuses attention on questions that the agency should address in subsequent rulemaking to supersede the policy that has been developed through adjudicative proceedings.

The requirement in subdivision (b) that a mere repetition or paraphrase of the relevant statute or regulation be accompanied by a statement of the underlying facts is drawn from the second sentence of 1981 Model APA § 4-215(c).

The requirement in subdivision (b) that a determination based on credibility be identified is derived from Rev. Code Wash. Ann. §§ 34.05.461(3) and 34.05.464(4). A determination of this type is entitled to great weight on judicial review to the extent the statement of decision identifies the observed demeanor, manner, or attitude of the witness that supports the determination. Code Civ. Proc. § 1094.5 (administrative mandamus). The observed manner of a witness includes observed actions of the witness.

The first sentence of subdivision (c) codifies existing California case law. See, e.g., Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). It is drawn from the first sentence of 1981 Model State APA § 4-215(d). The second sentence codifies existing practice in some agencies. Third sentence is drawn from 1981 Model State APA § 4-215(d).

§ 649.130. Issuance of proposed decision

649.130. (a) Within 30 days after delivery of a proposed decision to the agency head, the agency head shall issue the proposed decision as a public record and serve a copy of the proposed decision on each party.

(b) Issuance and service under this section is not an adoption of a proposed decision by the agency head. Nothing in this section limits the time within which a proposed decision becomes a final decision under Section 649.150.

Comment. Subdivision (a) of Section 649.130 restates the second paragraph of former Section 11517(b) and extends it to an exempt hearing, along with the authority of the agency to vary the time allowed for issuance. Service on a party is accomplished by service on the party's attorney or authorized representative if the party has an attorney or authorized representative of record in the proceeding. Section 613.210 (service).

Subdivision (b) makes clear the distinction between the issuance requirement for a proposed decision (this section) and the time within which the agency must act before a proposed decision becomes final (Section 649.150). The time within which a proposed decision must be issued does not affect the time the agency has for acting on the proposed decision.

§ 649.140. Adoption of proposed decision

649.140. (a) Within 100 days after delivery of the proposed decision to the agency head, the agency head may summarily do any of the following:

(1) Adopt the proposed decision in its entirety as a final decision.

(2) Make technical or other minor changes in the proposed decision and adopt it as a final decision. Action by the agency head under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(3) Reduce or otherwise mitigate a proposed remedy and adopt the balance of the proposed decision as a final decision.

(b) In proceedings under this section the agency head shall consider the proposed decision but need not review the record in the case.

Comment. Section 649.140 is drawn from the second paragraph of former Section 11517(b). The authority in subdivision (a)(2) to adopt "with changes" supplements the general authority of the agency head under Section 649.170 (correction of mistakes and clerical errors in final decision).

Mitigation of a proposed remedy under subdivision (a)(3) includes adoption of a different sanction, as well as reduction in amount, so long as the sanction adopted is not of increased severity.

It should be noted that the adoption procedure is available to an agency as an alternative to review procedures under Article 8 (commencing with Section 649.210) (administrative review of proposed decision).

§ 649.150. Time proposed decision becomes final

649.150. Unless adopted as a final decision under Section 649.140 or reviewed under Article 2 (commencing with Section 649.210), a proposed decision becomes a final decision at the earliest of the following times:

(a) If pursuant to Section 649.210 by regulation the agency precludes administrative review, at the time the proposed decision is issued by the presiding officer.

(b) If pursuant to Section 649.210 by regulation the agency limits administrative review, at the time limited in the regulation.

(c) If the agency head in the exercise of discretion denies administrative review, at the time administrative review is denied.

(d) One hundred days after delivery of the proposed decision to the agency head.

Comment. Section 649.150 supersedes the first sentence of subdivision (d) of former Section 11517. See also 1981 Model State APA § 4-220(b). The time within which a proposed decision becomes final is not affected by the time within which a copy of the proposed decision must be issued by the agency as a public record. See Section 649.130 & Comment (issuance of proposed decision).

An agency that wishes to reject a proposed decision must do so through the administrative review procedure. *Cf.* Section 649.240 (decision or remand).

§ 649.160. Service of final decision on parties

649.160. (a) The agency shall serve a copy of the final decision in the proceeding on each party within 10 days after the final decision is issued. The final decision shall state its effective date and shall be accompanied by a statement of the time within which judicial review of the decision may be initiated. Failure to state the time within which judicial review may be initiated extends the time to six months after service of the decision.

(b) If a proposed decision is issued and served on the parties in the proceeding and the agency head adopts the proposed decision as a final decision under Section 649.140 or the proposed decision becomes a final decision by operation of law under Section 649.150, the agency may satisfy subdivision (a) by service of a notice that states the effective date and judicial review period and that the

proposed decision is the final decision or, if the final decision makes technical or other minor changes in the proposed decision, that the proposed decision is the final decision, with specified changes. A notice under this subdivision may be served simultaneously with service of a copy of the proposed decision under Section 649.130.

(c) The final decision shall be issued immediately by the agency as a public record.

Comment. Section 649.160 supersedes the third sentence of former Section 11517(b), former Section 11517(e), and the third sentence of former Section 11518. For the manner of service (including service on a party's attorney or authorized representative of record instead of the party), see Section 613.210.

The California Public Records Act governs the accessibility of a decision to the public, including exclusions from coverage, confidentiality, and agency regulations affecting access. Gov't Code §§ 6250-6268.

§ 649.170. Correction of mistakes and clerical errors in final decision

649.170. (a) Within 15 days after service of a copy of a final decision on a party, but not later than the effective date of the decision, the party may apply to the agency head for correction of a mistake or clerical error in the final decision, stating the specific ground on which the application is made. Notice of the application shall be given to the other parties to the proceeding. The application is not a prerequisite for seeking administrative or judicial review.

(b) The agency head may refer the application to the presiding officer who formulated the proposed or final decision or may delegate its authority under this section to one or more persons.

(c) The agency head may deny the application, grant the application and modify the final decision, or grant the application and set the matter for further proceedings. The application is considered denied if the agency head does not dispose of it within 15 days after it is made.

(d) Nothing in this section precludes the agency head, on its own motion or on motion of the presiding officer, from modifying a final decision to correct a mistake or clerical error. A modification under this subdivision shall be made within 15 days after issuance of the final decision.

(e) The agency head shall, within 15 days after correction of a mistake or clerical error in a final decision, serve a copy of the correction on each party on which a copy of the final decision was previously served.

Comment. Section 649.170 supersedes former Section 11521 (reconsideration). It is analogous to Code of Civil Procedure Section 473 and is drawn from 1981 Model State APA § 4-218. "Party" includes the agency that is a party to the proceedings. Section 610.460 ("party" defined).

The section is intended to provide parties a limited right to remedy mistakes in the final decision without the need for administrative or judicial review. Instances where this procedure is intended to apply include correction of factual or legal errors in the final decision. This supplements the authority in Section 649.140(a)(2) of the agency head to adopt a proposed decision with technical or other minor changes.

For general provisions on notices to parties, see Sections 613.210 (service) and 613.220 (mail). The times provided in this section are extended in the case of service by mail or other means. Section 613.230 (extension of time).

Article 2. Administrative Review of Decision

§ 649.210. Availability and scope of review

649.210. (a) Subject to subdivision (b), an agency may review a proposed or final decision on its own motion or on petition of a party. In the exercise of discretion under this subdivision, the agency head may do any of the following with respect to administrative review of the proposed or final decision:

(1) Determine to review some but not all issues, or not to exercise any review.

(2) Delegate its review authority to one or more persons.

(3) Authorize review by one or more persons, subject to further review by the agency head.

(b) By regulation an agency may mandate administrative review, or may preclude or limit administrative review, of a proposed or final decision.

Comment. Section 649.210 is drawn from 1981 Model State APA § 4-216(a)(1)-(2). A proposed decision that is not reviewed becomes final at the time specified in Section 649.150.

This section is subject to a contrary statute that may, for example, require the agency head itself to hear and decide a specific issue. See, e.g., Greer v. Board of Education, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (school board, rather than hearing officer, formerly required to determine issues under Education Code § 13443). See Section 641.120 (modification or inapplicability of statute by regulation).

§ 649.220. Initiation of review

649.220. On service of a copy of a proposed or final decision that is subject to review under Section 649.210, but not later than the effective date of the decision stated in the decision or if the effective date is not stated in the decision not later than 30 days after service:

(a) A party may petition the agency head for administrative review of the proposed or final decision. The petition shall state the basis for review.

(b) The agency head on its own motion may give written notice of administrative review of the proposed or final decision. The notice shall be served on each party and, if review is limited to specified issues, shall identify the issues for review.

Comment. Section 649.220 supersedes a portion of the first sentence of former Section 11517(d). See also 1981 Model State APA § 4-216(b)-(c). For the manner of service, see Section 613.210. See also Section 613.230 (extension of time).

§ 649.230. Review procedure

649.230. (a) The reviewing authority shall decide the case on the record, including a transcript or a summary of evidence, a recording of proceedings, or other record used by the agency, of the portions of the proceeding under review that the reviewing authority considers necessary. A copy of the record shall be

made available to the parties. The reviewing authority may take additional evidence that, in the exercise of reasonable diligence, could not have been produced at the hearing.

(b) The reviewing authority shall allow each party an opportunity to present a written brief or an oral argument as determined by the reviewing authority.

(c) The reviewing authority may remand the matter for further proceedings. The remand shall be to the presiding officer who formulated the proposed decision, if reasonably available.

(d) The reviewing authority is subject to the same provisions governing qualifications, separation of functions, ex parte communications, and substitution that would apply to the presiding officer in the hearing.

Comment. Section 649.230 restates the first, second, and fifth sentences of former Section 11517(c) except that the reviewing authority is precluded from taking additional evidence (except evidence unavailable at the hearing before the presiding officer). *Cf.* Code Civ. Proc. § 1094.5(e); see also 1981 Model State APA § 4-216(d)-(f). The reviewing authority is the agency head or person to which the authority to review is delegated. Section 610.680 ("reviewing authority" defined).

Subdivision (a) requires only that the record be made available to the parties. The cost of providing a copy of the record is a matter left to the discretion of each agency as appropriate for its situation.

Subdivision (d) extends to the reviewing authority the provisions of this part governing qualifications (Sections 643.210-643.230), separation of functions (Sections 643.320-643.340), ex parte communications (Sections 648.510-648.550), and substitution (Section 643.130), that are applicable to the presiding officer.

If further proceedings are required, they may be obtained on remand under Section 649.240.

§ 649.240. Decision or remand

649.240. (a) Within 100 days after presentation of briefs and arguments, or if a transcript is ordered, after receipt of the transcript, the reviewing authority shall do one of the following:

(1) Issue a final decision disposing of the proceeding.

(2) Remand the matter for further proceedings. The remand shall be to the presiding officer who formulated the proposed or final decision, if reasonably available.

(3) Reject the proposed or final decision, without remand. The reviewing authority shall dispose of the proceeding within a reasonable time after rejection.

(b) The time under subdivision (a) may be waived or extended with the written consent of all parties or for good cause. Disposition of the proceeding under subdivision (a) shall only be pursuant to the procedure provided in Section 649.230 (review procedure).

(c) A final decision or a remand for further proceedings shall be in writing and shall include, or incorporate by express reference to the original proposed or final decision, all the matters required by Section 649.120 (form and contents of decision). A remand for further proceedings shall specify the ground for remand

and shall include precise instructions to the presiding officer of the action required.

(d) The reviewing authority shall cause a copy of the final decision or remand for further proceedings to be served on each party.

Comment. Section 649.240 supersedes Government Code § 11517(c)-(d). It is drawn in part from 1981 Model State APA § 4-216(g)-(j). Disposition of the proceeding under this section must be done pursuant to Section 649.230, which provides for either review on the record or remand; the reviewing authority may not hear the matter de novo.

Remand is required to the presiding officer who issued the proposed decision only if "reasonably" available. Thus if workloads make remand to the same presiding officer impractical, the officer would not be reasonably available, and remand need not be made to that particular person.

Specification of the ground for remand must be precise, but need not include the same details of explanation as a final decision would contain. The specification may include such matters as the need for additional proceedings resulting from newly discovered evidence.

The reviewing authority is the agency head or person to which the authority to review is delegated. Section 610.680 ("reviewing authority" defined). For the manner of service, see Section 613.210.

§ 649.250. Procedure on remand

649.250. (a) On remand, the reviewing authority may order authorized and appropriate temporary relief.

(b) The presiding officer shall prepare a revised proposed or final decision on remand based on the additional evidence and the record of the prior hearing.

(c) The revised proposed or final decision on remand shall be served on each party and is subject to correction and review to the same extent and in the same manner as an original proposed or final decision.

Comment. Subdivision (a) of Section 649.250 is drawn from 1981 Model State APA § 4-216(g). Subdivisions (b) and (c) restate the third and fourth sentences of former Section 11517(c). For the record in the proceeding, see Section 649.230 (review procedure). For the manner of service, see Section 613.210.

Article 3. Precedent Decisions

§ 649.310. Precedential effect of decision

649.310. A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

Comment. Section 649.310 is new.

§ 649.320. Designation of precedent decision

649.320. (a) An agency shall designate as a precedent decision a final decision or part of a final decision that contains a significant legal or policy determination of general application that is likely to recur.

(b) Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, relating to rulemaking.

(c) An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

Comment. Section 649.320 recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. See Section 12935(h) (Fair Employment and Housing Commission); Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Section 649.320 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision.

This section applies notwithstanding any contrary implication in Section 11347.5 ("underground regulations"). Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.

§ 649.330. Index of precedent decisions

649.330. (a) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update.

(b) The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

Comment. The index required by Section 649.330 is a public record, available for public inspection and copying.

§ 649.340. Article not retroactive

649.340. (a) This article applies to final decisions issued on or after July 1, 1997.

(b) Nothing in this article precludes an agency from designating as a precedent decision a final decision issued before July 1, 1997.

Comment. Section 649.340 minimizes the potential burden on agencies by making the precedent decision requirements prospective only.

CHAPTER 10. IMPLEMENTATION OF DECISION

§ 650.110. Effective date of decision

650.110. (a) The decision is effective on the date stated in the decision or, if the effective date is not stated in the decision, 30 days after it becomes final, unless:

(1) The agency head orders that the decision becomes effective sooner.

(2) The agency head orders that enforcement of the decision shall be stayed.

(b) A party may not be required to comply with a final decision unless the party has been served with or has actual knowledge of the final decision.

(c) A nonparty may not be required to comply with a final decision unless the agency has made the final decision available for public inspection and copying or the nonparty has actual knowledge of the final decision.

(d) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Sections 634.010-634.080 (emergency decision).

Comment. Subdivision (a) of Section 650.110 restates subdivision (a) and a portion of the first sentence of subdivision (b) of former Section 11519, with the addition of the provision for statement of the effective date in the decision. The remainder of the section is drawn from 1981 Model State APA § 4-220(c)-(d). The section distinguishes between the effective date of a decision and the time when it can be enforced. For provisions on stays, see Section 650.120.

The requirement of "actual knowledge" in subdivisions (b) and (c) is intended to include not only knowledge that an order has been issued, but also knowledge of the general contents of the order insofar as it pertains to the person who is required to comply with it. If a question arises whether a particular person had actual knowledge of an order, this must be resolved in the manner that other fact questions are resolved.

The binding effect of an order on nonparties who have actual knowledge may be illustrated by a state law that prohibits wholesalers from delivering alcoholic beverages to liquor dealers unless the dealers hold valid licenses from the state beverage agency. If the agency issues an order revoking the license of a particular dealer, this order is binding on any wholesaler who has actual knowledge of it, even before the order is made available for public inspection and copying; the order binds all wholesalers, including those without actual knowledge, after it has been made available for public inspection and copying.

§ 650.120. Stay

650.120. A stay of enforcement may be included in the decision or may be ordered at any time before the decision becomes effective.

Comment. Section 650.120 restates the first sentence of former Section 11519(b).

§ 650.130. Probation

650.130. (a) A stay of enforcement may be accompanied by an express condition that the person to which the agency action is directed comply with specified terms of probation. Specified terms of probation shall be just and reasonable in the light of the findings and decision.

(b) Specified terms of probation may include an order of restitution that requires the person to which the agency action is directed to compensate the other party to a contract damaged as a result of a breach of contract by the person to which the agency action is directed. In such a case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of the breach. If restitution is ordered and paid under this subdivision, the amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

Comment. Subdivision (a) of Section 650.130 restates the last sentence of former Section 11519(b). Subdivision (b) restates former Section 11519(d).

CONFORMING REVISIONS AND REPEALS

Note. Only selected statutes are set out here. It is intended that, among other conforming revisions made throughout the codes, all conflicting and special provisions governing state agency adjudicative proceedings will be repealed. **If there is a special or unique provision of**

an agency that should be preserved, this should be called to the attention of the Law Revision Commission. The conforming revisions will also make clear that any proceeding not now subject to the Administrative Procedure Act is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

BUSINESS AND PROFESSIONS CODE

Bus. & Prof. Code § 491.5 (added). Registration with public officer

491.5. If a person whose license has been revoked or suspended was required to register with a public officer, a notification of the suspension or revocation shall be sent to the officer after the decision has become effective.

Comment. Section 491.5 restates former Government Code Section 11519(c).

Bus. & Prof. Code § 494.1 (added). Interim orders

494.1. (a) The administrative law judge of the Medical Quality Hearing Panel established pursuant to Section 636.210 may issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health profession, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare.

(b) All orders authorized by this section shall be issued only after a hearing conducted pursuant to subdivision (d), unless it appears from the facts shown by affidavit that serious injury would result to the public before the matter can be heard on notice. Except as provided in subdivision (c), the licensee shall receive at least 15 days' prior notice of the hearing, which notice shall include affidavits and all other information in support of the order.

(c) If an interim order is issued without notice, the administrative law judge who issued the order without notice shall cause the licensee to be notified of the order, including affidavits and all other information in support of the order by a 24-hour delivery service. That notice shall also include the date of the hearing on the order, which shall be conducted in accordance with the requirement of subdivision (d), not later than 20 days from the date of issuance. The order shall be dissolved unless the requirements of subdivision (a) are satisfied.

(d) For the purposes of the hearing conducted pursuant to this section, the licentiate shall, at a minimum, have the following rights:

(1) To be represented by counsel.

(2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the record.

(3) To present written evidence in the form of relevant declarations, affidavits, and documents.

The discretion of the administrative law judge to permit testimony at the hearing conducted pursuant to this section shall be identical to the discretion of a superior court judge to permit testimony at a hearing conducted pursuant to Section 527 of the Code of Civil Procedure.

(4) To present oral argument.

(e) Consistent with the burden and standards of proof applicable to a preliminary injunction entered under Section 527 of the Code of Civil Procedure, the *court* shall grant the interim order where, in the exercise of its discretion, it concludes that:

(1) There is a reasonable probability that the petitioner will prevail in the underlying action.

(2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

(f) In all cases where an interim order is issued, and an agency pleading is not filed and served pursuant to the Administrative Procedure Act, Division 3.3 (commencing with Section 600) of Title 1 of the Government Code, within 15 days of the date in which the parties to the hearing on the interim order have submitted the matter, the order shall be dissolved.

Upon service of the agency pleading the licensee shall have, in addition to the rights granted by this section, all of the rights and privileges available as specified in the Administrative Procedure Act. If the licensee requests a hearing on the accusation, the board shall provide the licensee with a hearing within 30 days of the request, unless the licensee stipulates to a later hearing, and a decision within 15 days of the date that matter is submitted, or the board shall nullify the interim order previously issued, unless good cause can be shown by the division for a delay.

(g) Where an interim order is issued, a written decision shall be prepared within 15 days of the hearing, by the administrative law judge, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached.

(h) Notwithstanding the fact that interim orders issued pursuant to this section are not issued after a hearing as otherwise required by the Administrative Procedure Act, interim orders so issued shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure. The relief which may be ordered shall be limited to a stay of the interim order. Interim orders issued pursuant to this section are final interim orders and, if not dissolved pursuant to subdivision (c) or (f), may only be challenged administratively at the hearing on the agency pleading.

(i) The interim order provided for by this section shall be in addition to, and not a limitation on, the authority to seek injunctive relief provided for in this code.

Comment. Section 494.1 continues former Government Code Section 11529 without substantive change. A statement of legislative intent concerning this section is enacted at 1993 Cal. Stats. ch. 1267, § 58:

> It is the intent of the Legislature to substitute the standard governing the issuance of a preliminary injunction under Section 527 of the Code of Civil Procedure for the "clear and convincing evidence" standard as the standard for granting an interim order pursuant to Section 11529 of the Government Code, and to this extent the decision of the Court of Appeal in Silva v. Superior Court, (Heerhartz) (March 1993), 14 Cal. App. 4th 562, mod. of opn. on den. rehg. 14 Cal. App. 4th 1678b, rev. den. (1993) _____ Cal. 4th _____, is expressly overturned. It is also the intent of the Legislature that the standard of proof applicable to an accusation filed in connection with a petition for an interim order shall continue to be clear and convincing evidence.

Bus. & Prof. Code § 494.5 (added). Reinstatement of license or reduction of penalty

494.5. (a) A person whose license has been revoked or suspended may apply to the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition.

(b) The agency shall give notice to the Attorney General of the application and the Attorney General and the applicant shall be given an opportunity to present either oral or written argument before the agency head.

(c) The agency head shall decide the application, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably determines are appropriate to impose as a condition of reinstatement.

(d) This section does not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Comment. Section 494.5 restates former Government Code Section 11522.

ADMINISTRATIVE MANDAMUS

Code Civ. Proc. § 1094.5 (amended). Administrative mandamus

1094.5. ...

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. In making a determination under this subdivision in a review of a decision under Division 3.3 (commencing with Section 600) of Title 1 of the Government Code, the court shall give great weight to a determination of the presiding officer in the adjudicative proceeding based substantially on credibility of a witness to the extent the determination of the presiding officer identifies the observed demeanor, manner, or attitude of the witness that supports the determination.

...

Comment. Subdivision (c) of Section 1094.5 is amended to adopt the rule of Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), for proceedings under the Administrative Procedure Act, requiring that the reviewing court weigh more heavily findings by the trier of fact (the presiding officer in an administrative adjudication) based on observation of witnesses than findings based on other evidence. This generalizes the standard of review used by a number of California agencies. See, e.g., Lamb v. W.C.A.B., 11 Cal. 3d 274, 281, 520 P.2d 978, 113 Cal. Rptr. 162 (1974) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Precedent Decisions P-B-10, P-T-13, P-B-57 (Unemployment Insurance Appeals Board); Labor Code § 1148 (Agricultural Labor Relations Board). It reverses the existing practice under the administrative procedure act and other California administrative procedures that gives no weight to the findings of the presiding officer at the hearing. See Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1114 (1992).

Findings based substantially on credibility of a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. Gov't Code § 649.120(b) (form and contents of decision). However, the presiding officer's identification of such findings is not binding on the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility of a witness.

Under subdivision (c), even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness. Nothing in subdivision (c) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. See Evid. Code § 780. Nor does it preclude the agency head from overturning a factual finding based on the presiding officer's assessment of expert witness testimony.

ADMINISTRATIVE PROCEDURE ACT

Gov't Code § 11340.4 (added). Study of administrative rulemaking

11340.4. (a) The office is authorized and directed to:

(1) Study the subject of administrative rulemaking in all its aspects.

(2) Submit its suggestions to the various agencies in the interests of fairness, uniformity, and the expedition of business.

(3) Report its recommendations to the Governor and Legislature at the commencement of each general session.

(b) All agencies of the state shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control. Nothing in this subdivision authorizes an agency to give access to records required by statute to be kept confidential.

Comment. Section 11340.4 is new. It delegates to the Office of Administrative Law authority formerly found in Section 11370.5 relating to the study of "administrative law" by the Office of Administrative Hearings. See also Section 610.190 ("agency" defined). Cf. Section 636.180 (authority of Office of Administrative Hearings to study administrative adjudication).

CHAPTER 4. OFFICE OF ADMINISTRATIVE HEARINGS

§ 11370 (repealed). Administrative Procedure Act

11370. Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act.

Comment. Former Section 11370 is restated in Section 600 (short title).

§ 11370.1 (repealed). "Director"

11370.1. As used in the Administrative Procedure Act "director" means the executive officer of the Office of Administrative Hearings.

Comment. Former Section 11370.1 is continued in Section 636.110(a) ("director" defined).

§ 11370.2 (repealed). Office of Administrative Hearings

11370.2. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as administrative law judges, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) Any and all references in any law to the Office of Administrative Procedure shall be deemed to be the Office of Administrative Hearings.

Comment. Former Section 11370.2 is restated in Section 636.120 (Office of Administrative Hearings).

§ 11370.3 (repealed). Personnel

11370.3. The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges qualified under Section 11502 which is sufficient to fill the needs of the various state agencies. The director shall also appoint hearing officers, shorthand reporters, and such other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may assign an administrative law judge or a hearing officer to conduct other administrative proceedings not arising under that chapter and shall assign hearing reporters as required. The director shall assign an administrative law judge for any proceeding arising pursuant to Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code upon the request of a public prosecutor. Any administrative law judge, hearing officer, or other employee so assigned shall be deemed an employee of the office and not of the agency to which he or she is assigned. When not engaged in hearing cases, administrative law judges and hearing officers may be assigned by the director to

perform other duties vested in or required of the office, including those provided for in Section 11370.5.

Comment. The first sentence of former Section 11370.3 is restated in subdivision (a) of Section 636.130 (administrative law judges). The second sentence is restated in Section 636.140 (and other personnel), deleting the reference to hearing officers and the limitation to shorthand reporters.

The first part of the third sentence is superseded by subdivision (a) of Section 636.150 (assignment of administrative law judges). The second part is restated in subdivision (b) of Section 636.150, deleting the reference to hearing officers. The third part is restated in subdivision (c) of Section 636.150.

The fourth sentence is omitted as unnecessary. See Section 636.150(a) (assignment of administrative law judges) and Bus. & Prof. Code § 22460.5.

The fifth sentence is restated in subdivision (d) of Section 636.150 (assignment of administrative law judges), deleting the reference to hearing officers.

The sixth sentence is restated in subdivision (e) of Section 636.150 (assignment of administrative law judges), deleting the reference to hearing officers.

§ 11370.4 (repealed). Costs

11370.4. The total cost to the state of maintaining and operating the Office of Administrative Hearings shall be determined by, and collected by the Department of General Services in advance or upon such other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Former Section 11370.4 is restated in Section 636.170.

§ 11370.5 (repealed). Administrative law and procedure

11370.5. The office is authorized and directed to study the subject of administrative law and procedure in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature at the commencement of each general session. All departments, agencies, officers and employees of the State shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge of control.

Comment. Former Section 11370.5 is restated in Sections 610.190 ("agency" defined) and 636.180 (study of administrative law and procedure).

§ 11371 (repealed). Medical Quality Hearing Panel

11371. (a) There is within the Office of Administrative Hearings a Medical Quality Hearing Panel, consisting of no fewer than five full-time administrative law judges. The administrative law judges shall have medical training as recommended by the Division of Medical Quality of the Medical Board of California and approved by the Director of the Office of Administrative Hearings.

(b) The director shall determine the qualifications of panel members, supervise their training, and coordinate the publication of a reporter of decisions pursuant to this section. The panel shall include only those persons specifically qualified and shall at no time constitute more than 25 percent of the total number of

administrative law judges within the Office of Administrative Hearings. If the members of the panel do not have a full workload, they may be assigned work by the Director of the Office of Administrative Hearings. When the medically related case workload exceeds the capacity of the members of the panel, additional judges shall be requested to be added to the panels as appropriate. When this workload overflow occurs on a temporary basis, the Director of the Office of Administrative Hearings shall supply judges from the Office of Administrative Hearings to adjudicate the cases.

(c) The decisions of the administrative law judges of the panel, together with any court decisions reviewing those decisions, or any court decisions relevant to medical quality adjudications shall be published in a quarterly "Medical Discipline Report," to be funded from the Contingent Fund of the Medical Board of California.

(d) The administrative law judges of the panel shall have panels of experts available. The panels of experts shall be appointed by the Director of the Office of Administrative Hearings, with the advice of the Medical Board of California. These panels of experts may be called as witnesses by the administrative law judges of the panel to testify on the record about any matter relevant to a proceeding and subject to cross examination by all parties. The administrative law judge may award reasonable expert witness fees to any person or persons serving on a panel of experts, which shall be paid from the Contingent Fund of the Medical Board of California.

(e) On or before April 1, 1997, the Medical Board of California shall prepare, in consultation with the Office of Administrative Hearings, an analysis and report that evaluates the effectiveness of the Medical Quality Hearing Panel since its creation. Among other things, the report shall analyze whether administrative adjudications against physicians have been expedited, the aging of cases at the office, whether administrative decisions and penalties ordered in the discipline of physicians have become more consistent, and whether the panels of the Division of Medical Quality have adopted more proposed decisions than prior to the creation of the panel. The board shall send a copy of its report to the Chairpersons of the Senate Committee on Business and Professions and the Assembly Committee on Health, to the Office of Administrative Hearings, and to the Director of Consumer Affairs.

(f) This section shall remain in effect only until January 1, 1997, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1997, deletes or extends that date.

Comment. Former Section 11371 is continued without change in Section 636.210 (Medical Quality Hearing Panel).

§ 11372 (repealed). Conduct of hearing by administrative law judge

11372. (a) Except as provided in subdivision (b), all adjudicative hearings and proceedings relating to the discipline or reinstatement of licensees of the Medical

Board of California, including licensees of allied health agencies within the jurisdiction of the Medical Board of California, that are heard pursuant to the Administrative Procedure Act, shall be conducted by an administrative law judge as designated in Section 11371, sitting alone if the case is so assigned by the agency filing the charging pleading.

(b) Proceedings relating to interim orders shall be heard in accordance with Section 11529.

Comment. Former Section 11372 is continued in Section 636.220 (conduct of hearing by administrative law judge) without substantive change.

§ 11373 (repealed). Conduct of proceedings under Administrative Procedure Act

11373. All adjudicative hearings and proceedings conducted by an administrative law judge as designated in Section 11371 shall be conducted under the terms and conditions set forth in the Administrative Procedure Act, except as provided in the Medical Practice Act (Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code).

Comment. Former Section 11373 is continued in Section 636.230 (conduct of proceedings under Administrative Procedure Act)without substantive change.

§ 11373.3 (repealed). Facilities and support personnel for review committee panel

11373.3. The Office of Administrative Hearings shall provide facilities and support personnel for the review committee panel and shall assess the Medical Board of California for facilities and personnel, where used to adjudicate cases involving the Medical Board of California.

Comment. Former Section 11373.3 is continued in Section 636.240 (facilities and support personnel for review committee panel) without change.

Gov't Code §§ 11500-11529 (repealed). Administrative adjudication

CHAPTER 5. ADMINISTRATIVE ADJUDICATION

§ 11500 (repealed). Definitions

11500. In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions, and officers enumerated in Section 11501 and those to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency, and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

(b) "Party" includes the agency, the respondent, and any person, other than an officer or an employee of the agency in his or her official capacity, who has been allowed to appear or participate in the proceeding.

(c) "Respondent" means any person against whom an accusation is filed pursuant to Section 11503 or against whom a statement of issues is filed pursuant to Section 11504.

(d) "Administrative law judge" means an individual qualified under Section 11502.

(e) "Agency member" means any person who is a member of any agency to which this chapter is applicable and includes any person who himself or herself constitutes an agency.

(f) "Adjudicatory hearing" means a state agency hearing which involves personal or property rights of an individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual. However, the procedures governing such a hearing shall include, but not be limited to, all of the following:

(1) Testimony under oath.

(2) The right to cross-examination and to confront adversary witnesses.

(3) The right to representation.

(4) The issuance of a formal decision.

For purposes of this subdivision, an "adjudicatory hearing" shall not be required to include any informal factfinding or informal investigatory hearing. However, nothing in this subdivision shall be construed to prohibit an agency from providing an interpreter during any such informal hearing.

(g) "Language assistance" means oral interpretation or written translation of a language other than English into English or of English into another language for a party who cannot speak or understand English or who can do so only with difficulty.

Comment. The introductory portion of former Section 11500 is restated in Section 610.010 (application of definitions).

Subdivision (a) is superseded by Sections 612.110 (application of division to state) and 610.250 ("agency head" defined). An agency may delegate the power of the agency head to review a proposed decision in an administrative adjudication. Section 649.220 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

The substance of subdivision (b) is restated in Section 610.460 ("party" defined).

Subdivision (c) is not continued. The respondent is referred to as the person to which the agency action is directed.

Subdivision (d) is superseded by Section 643.120 (presiding officer).

The substance of subdivision (e) is restated in Section 610.280 ("agency member" defined).

Subdivision (f) is superseded by Sections 612.110 (application of division to state), 610.310 ("decision" defined), 648.330 (oral and written testimony), 648.320 (presentation of testimony), 613.320 (representation by attorney), 649.120 (form and contents of decision), 631.010 (application to constitutionally and statutorily required hearings), and 648.230 (language assistance).

Subdivision (g) is superseded by Section 648.210 ("language assistance" defined).

§ 11501 (repealed). Application of chapter

11501. (a) This chapter applies to any agency as determined by the statutes relating to that agency.

(b) The enumerated agencies referred to in Section 11500 are:

Accountancy, State Board of
Air Resources Board, State
Alcohol and Drug Programs, State Department of
Alcoholic Beverage Control, Department of
Architectural Examiners, California State Board of
Attorney General
Auctioneer Commission, Board of Governors of
Automotive Repair, Bureau of
Barber Examiners, State Board of
Behavioral Science Examiners, Board of
Boating and Waterways, Department of
Cancer Advisory Council
Cemetery Board
Chiropractic Examiners, Board of
Collection and Investigative Services, Bureau of
Community Colleges, Board of Governors of the California
Conservation, Department of
Consumer Affairs, Director of
Contractors, Registrar of
Corporations, Commissioner of
Cosmetology, State Board of
Dental Examiners of California, Board of
Education, State Department of
Electronic and Appliance Repair, Bureau of
Engineers and Land Surveyors, State Board of Registration for Professional
Fair Political Practices Commission
Fire Marshal, State
Food and Agriculture, Director of
Forestry and Fire Protection, Department of
Funeral Directors and Embalmers, State Board of
Geologists and Geophysicists, State Board of Registration for
Guide Dogs for the Blind, State Board of
Health Services, State Department of
Highway Patrol, Department of the California
Home Furnishings and Thermal Insulation, Bureau of
Horse Racing Board, California
Housing and Community Development, Department of
Insurance Commissioner

Labor Commissioner
Landscape Architects, State Board of
Medical Board of California, Medical Quality Review Committees and Examining Committees
Motor Vehicles, Department of
Nursing, Board of Registered
Nursing Home Administrators, Board of Examiners of
Optometry, State Board of
Osteopathic Medical Board of California
Pharmacy, California State Board of
Public Employees' Retirement System, Board of Administration of the
Real Estate, Department of
San Francisco, San Pablo and Suisun, Board of Pilot Commissioners for the Bays of
Savings and Loan Commissioner
School Districts
Secretary of State, Office of
Shorthand Reporters Board, Certified
Social Services, State Department of
Statewide Health Planning and Development, Office of
Structural Pest Control Board
Tax Preparer Program, Administrator
Teacher Credentialing, Commission on
Teachers' Retirement System, State
Transportation, Department of, acting pursuant to the State Aeronautics Act
Veterinary Medicine, Board of Examiners in
Vocational Nurse and Psychiatric Technician Examiners of the State of California, Board of

Comment. Former Section 11501 is superseded by Sections 612.110 (application of division to state) and 612.120 (application of division to local agencies).

§ 11501.5 (repealed). Language assistance; provision by state agencies

11501.5. (a) The following state agencies shall provide language assistance at adjudicatory hearings pursuant to subdivision (d) of Section 11513:

Agricultural Labor Relations Board
State Department of Alcohol and Drug Abuse
Athletic Commission
California Unemployment Insurance Appeals Board
Board of Prison Terms
Board of Cosmetology
State Department of Developmental Services
Public Employment Relations Board

Franchise Tax Board
State Department of Health Services
Department of Housing and Community Development
Department of Industrial Relations
State Department of Mental Health
Department of Motor Vehicles
Notary Public Section, Office of the Secretary of State
Public Utilities Commission
Office of Statewide Health Planning and Development
State Department of Social Services
Department of Toxic Substances Control
Workers' Compensation Appeals Board
Department of the Youth Authority
Youthful Offender Parole Board
Bureau of Employment Agencies
Board of Barber Examiners
Department of Insurance
State Personnel Board

(b) Nothing in this section shall be construed to prevent any agency other than those listed in subdivision (a) from electing to adopt any of the procedures set forth in subdivision (d), (e), (f), (g), (h), or (i) of Section 11513, except that the State Personnel Board shall determine the general language proficiency of prospective interpreters as described in subdivisions (d) and (e) of Section 11513 unless otherwise provided for as described in subdivision (f) of Section 11513.

Comment. Former Section 11501.5 is restated in Section 648.230 (application of article).

§ 11502 (repealed). Administrative law judges

11502. All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings. The Director of the Office of Administrative Hearings has power to appoint a staff of administrative law judges for the office as provided in Section 11370.3 of the Government Code. Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding his or her appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. The first sentence of former Section 11502 is superseded by Section 643.120 (designation of presiding officer by agency head where exempt from OAH). The second sentence is restated in subdivision (a) of Section 636.130 (administrative law judges). The third sentence is restated in subdivision (b) of Section 636.130.

§ 11502.1 (repealed). Health planning unit

11502.1. There is hereby established in the Office of Administrative Hearings a unit of administrative law judges who shall preside over hearings conducted

pursuant to Part 1.5 (commencing with Section 437) of Division 1 of the Health and Safety Code. In addition to meeting the qualifications of administrative law judges as prescribed in Section 11502, the administrative law judges in this unit shall have a demonstrated knowledge of health planning and certificate-of-need matters. As many administrative law judges as are necessary to handle the caseload shall be permanently assigned to this unit. In the event there are no pending certificate of need of health planning matters, administrative law judges in this unit may be assigned to other matters pending before the Office of Administrative Hearings. Health planning matters shall be given priority on the calendar of administrative law judges assigned to this unit.

Comment. Section 11502.1 is not continued. The requirement that health facilities and specialty clinics apply for and obtain certificates of need or certificates of exemption is indefinitely suspended. Health & Safety Code § 439.7 (1984 Cal. Stat. ch. 1745, § 14).

§ 11503 (repealed). Accusation

11503. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Comment. The first sentence of former Section 11503 is superseded by Sections 610.290 ("agency pleading" includes accusation) and 642.310 (proceeding initiated by agency pleading). The remainder is superseded by Section 642.320 (contents of agency pleading).

§ 11504 (repealed). Statement of issues

11504. A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency action sought. The statement of issues shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. The statement of issues shall be served in the same manner as an accusation; provided, that, if the hearing is held at the request of the respondent, the provisions of Sections 11505 and 11506 shall not apply and the statement of issues together with the notice of hearing shall be delivered or mailed to the

parties as provided in Section 11509. Unless a statement to respondent is served pursuant to Section 11505, a copy of Sections 11507.5, 11507.6 and 11507.7, and the name and address of the person to whom requests permitted by Section 11505 may be made, shall be served with the statement of issues.

Comment. The first sentence of former Section 11504 is superseded by Sections 610.290 ("agency pleading" includes statement of issues) and 642.310 (proceeding commenced by agency pleading). The remainder is superseded by Sections 642.320 (contents of agency pleading) and 642.330 (service of agency pleading).

§ 11504.5 (repealed). References to accusations include statements of issues

11504.5. In the following sections of this chapter, all references to accusations shall be deemed to be applicable to statements of issues except in those cases mentioned in subdivision (a) of Section 11505 and Section 11506 where compliance is not required.

Comment. Section 11504.5 is superseded by Section 610.290 ("agency pleading" includes accusation and statement of issues).

§ 11505 (repealed). Service on respondent

11505. (a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon him of the accusation, and that failure to do so will constitute a waiver of his right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7.

(b) The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency). You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 in the possession, custody or control of the agency, you may contact: (here insert name and address of appropriate person).

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency within 10 working days after you discover the good cause. Failure to notify the agency within 10 days will deprive you of a postponement.

(c) The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires respondent to file his address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency.

Comment. Section 11505 is superseded by Sections 643.230 (service of agency pleading and other information), 642.440 (notice of hearing), 642.340 (jurisdiction over person to which the agency action is directed), 613.210 (service), and 613.220 (mail).

§ 11506 (repealed). Notice of defense

11506. (a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense in which he may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

Within the time specified respondent may file one or more notices of defense upon any or all of these grounds but all such notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

(c) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow any particular form.

(d) Respondent may file a statement by way of mitigation even if he does not file a notice of defense.

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

Comment. Former Section 11506 is superseded by Sections 642.350 (response), 648.130 (default), and 613.210 (service).

§ 11507 (repealed). Amended accusation

11507. At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

Comment. Former Section 11507 is superseded by Section 642.360 (amended and supplemental pleadings).

§ 11507.5 (repealed). Discovery provisions exclusive

11507.5. The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter.

Comment. Former Section 11507.5 is superseded by Section 645.110 (application of article).

§ 11507.6 (repealed). Discovery

11507.6. After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after such service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to such person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;

(d) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(e) Any other writing or thing which is relevant and which would be admissible in evidence;

(f) Investigate reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

(g) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (j) of Section 11513. This subdivision is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed under this section.

Comment. Former Section 11507.6 is superseded by Sections 645.210 (time and manner of discovery), 645.220 (discovery of witness list), 645.230 (discovery or statements, writings, and reports), and 645.120 (discovery of evidence of sexual conduct).

§ 11507.7 (repealed). Petition to compel discovery

11507.7. (a) Any party claiming his request for discovery pursuant to Section 11507.6 has not been complied with may serve and file a verified petition to compel discovery in the superior court for the county in which the administrative hearing will be held, naming as respondent the party refusing or failing to comply with Section 11507.6. The petition shall state facts showing the respondent party failed or refused to comply with Section 11507.6, a description of the matters sought to be discovered, the reason or reasons why such matter is discoverable

under this section, and the ground or grounds of respondent's refusal so far as known to petitioner.

(b) The petition shall be served upon respondent party and filed within 15 days after the respondent party first evidenced his failure or refusal to comply with Section 11507.6 or within 30 days after request was made and the party has failed to reply to the request, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the administrative hearing except upon order of the court after motion and notice and for good cause shown. In acting upon such motion, the court shall consider the necessity and reasons for such discovery, the diligence or lack of diligence of the moving party, whether the granting of the motion will delay the commencement of the administrative hearing on the date set, and the possible prejudice of such action to any party.

(c) If from a reading of the petition the court is satisfied that the petition sets forth good cause for relief, the court shall issue an order to show cause directed to the respondent party; otherwise the court shall enter an order denying the petition. The order to show cause shall be served upon the respondent and his attorney of record in the administrative proceeding by personal delivery or certified mail and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the filing of the petition. The respondent party shall have the right to serve and file a written answer or other response to the petition and order to show cause.

(d) The court may in its discretion order the administrative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter to afford the parties time to comply with the court order.

(e) Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that such matter is not a discoverable matter under the provisions of Section 11507.6, or is privileged against disclosure under such provisions, the court may order lodged with it such matters as are provided in subdivision (b) of Section 915 of the Evidence Code and examine such matters in accordance with the provisions thereof.

(f) The court shall decide the case on the matters examined by the court in camera, the papers filed by the parties, and such oral argument and additional evidence as the court may allow.

(g) Unless otherwise stipulated by the parties, the court shall no later than 30 days after the filing of the petition file its order denying or granting the petition, provided, however, the court may on its own motion for good cause extend such time an additional 30 days. The order of the court shall be in writing setting forth the matters or parts thereof the petitioner is entitled to discover under Section 11507.6. A copy of the order shall forthwith be served by mail by the clerk upon the parties. Where the order grants the petition in whole or in part, such order shall not become effective until 10 days after the date the order is served by the

clerk. Where the order denies relief to the petitioning party, the order shall be effective on the date it is served by the clerk.

(h) The order of the superior court shall be final and not subject to review by appeal. A party aggrieved by such order, or any part thereof, may within 15 days after the service of the superior court's order serve and file in the district court of appeal for the district in which the superior court is located, a petition for a writ of mandamus to compel the superior court to set aside or otherwise modify its order. Where such review is sought from an order granting discovery, the order of the trial court and the administrative proceeding shall be stayed upon the filing of the petition for writ of mandamus, provided, however, the court of appeal may dissolve or modify the stay thereafter if it is in the public interest to do so. Where such review is sought from a denial of discovery, neither the trial court's order nor the administrative proceeding shall be stayed by the court of appeal except upon a clear showing of probable error.

(i) Where the superior court finds that a party or his attorney, without substantial justification, failed or refused to comply with Section 11507.6, or, without substantial justification, filed a petition to compel discovery pursuant to this section, or, without substantial justification, failed to comply with any order of court made pursuant to this section, the court may award court costs and reasonable attorney fees to the opposing party. Nothing in this subdivision shall limit the power of the superior court to compel obedience to its orders by contempt proceedings.

Comment. Former Section 11507.7 is superseded by Sections 645.310-645.350 (compelling discovery) and 648.610-648.630 (enforcement of orders and sanctions).

§ 11508 (repealed). Time and place of hearing

11508. (a) The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of hearing. The hearing shall be held in San Francisco if the transaction occurred or the respondent resides within the First or Sixth Appellate District, in the County of Los Angeles if the transaction occurred or the respondent resides within the Second or Fourth Appellate District, and in the County of Sacramento if the transaction occurred or the respondent resides within the Third or fifth Appellate District.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of respondent's residence, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the respondent resides.

(3) The parties by agreement may select any place within the state.

Comment. Former Section 11508 is superseded by Sections 642.410 (time and place of hearing) and 642.430 (venue and change of venue).

§ 11509 (repealed). Notice of hearing

11509. The agency shall deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense.

The notice to respondent shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before [here insert name of agency] at [here insert place of hearing] on the day of , 19_, at the hour of , upon the charges made in the accusation served upon you. You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to [here insert appropriate office of agency].

Comment. Former Section 11509 is superseded by Sections 642.410 (time and place of hearing) and 642.440 (notice of hearing). See also Section 613.320 (representation by attorney).

§ 11510 (repealed). Subpoenas

11510. (a) Before the hearing has commenced, the agency or the assigned administrative law judge shall issue subpoenas and subpoenas duces tecum at the request of any party for attendance or production of documents at the hearing. Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. After the hearing has commenced, the agency itself hearing a case or an administrative law judge sitting alone may issue subpoenas and subpoenas duces tecum.

(b) The process issued pursuant to subdivision (a) shall be extended to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. No witness shall be obliged to attend unless the witness is a resident of the state at the time of service.

(c) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Witnesses appearing pursuant to subpoena, except the parties, who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day shall be entitled in addition to fees and mileage to a per diem compensation of three dollars ($3) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees,

mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.

Comment. Former Section 11510 is superseded by Sections 645.410-645.440 (subpoenas).

§ 11511 (repealed). Depositions

11511. On verified petition of any party, an agency may order that the testimony of any material witness residing within or without the State be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of his testimony; a showing that the witness will be unable or can not be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. Where the witness resides outside the State and where the agency has ordered the taking of his testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 of the Government Code.

Comment. Former Section 11511 is superseded by Section 645.130 (depositions).

§ 11511.5 (repealed). Prehearing conferences

11511.5. (a) On motion of a party or by order of an administrative law judge, the administrative law judge may conduct a prehearing conference. The administrative law judge shall set the time and place for the prehearing conference, and the agency shall give reasonable written notice to all parties.

(b) The prehearing conference may deal with one or more of the following matters:

(1) Exploration of settlement possibilities.

(2) Preparation of stipulations.

(3) Clarification of issues.

(4) Rulings on identity and limitation of the number of witnesses.

(5) Objections to proffers of evidence.

(6) Order of presentation of evidence and cross-examination.

(7) Rulings regarding issuance of subpoenas and protective orders.

(8) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(9) Any other matters as shall promote the orderly and prompt conduct of the hearing.

(c) The administrative law judge shall issue a prehearing order incorporating the matters determined at the prehearing conference. The administrative law judge may direct one or more of the parties to prepare a prehearing order.

Comment. Former Section 11511.5 is superseded by Article 6.5 (commencing with Section 646.120) (prehearing conference).

§ 11512 (repealed). Presiding officer

11512. (a) Every hearing in a contested case shall be presided over by an administrative law judge. The agency itself shall determine whether the administrative law judge is to hear the case alone or whether the agency itself is to hear the case with the administrative law judge.

(b) When the agency itself hears the case, the administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; the agency itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge. When the administrative law judge alone hears a case, he or she shall exercise all powers relating to the conduct of the hearing.

(c) An administrative law judge or agency member shall voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request concerns an agency member, the issue shall be determined by the other members of the agency. Where the request concerns the administrative law judge, the issue shall be determined by the agency itself if the agency itself hears the case with the administrative law judge, otherwise the issue shall be determined by the administrative law judge. No agency member shall withdraw voluntarily or be subject to disqualification if his or her disqualification would prevent the existence of a quorum qualified to act in the particular case.

(d) The proceedings at the hearing shall be reported by a phonographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically.

(e) Whenever, after the agency itself has commenced to hear the case with an administrative law judge presiding, a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall render a proposed decision in accordance with subdivision (b) of Section 11517 of the Government Code.

Comment. The substance of the first sentence of subdivision (a) of former Section 11512 is restated in Section 643.110(a) (where administrative law judge required). The second sentence is restated in Section 643.110(b).

The first sentence of subdivision (b) is restated in Section 643.110(d)(1) and (2). The second sentence is restated in Section 643.110(c).

The first sentence of subdivision (c) of former Section 11512 is superseded by Section 643.220 (self disqualification). The second, third, and fourth sentences are superseded by Section 643.230 (procedure for disqualification of presiding officer). The fifth sentence is not continued: If disqualification would prevent the existence of a quorum qualified to act, a substitute presiding officer may be appointed under Section 643.130.

Subdivision (d) is superseded by Section 648.160 (report of proceedings).

Subdivision (e) is restated in Section 643.110(d)(3).

§ 11513 (repealed). Evidence

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.

In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at hearing unless offered to attack the credibility of the complainant, as provided for under subdivision (o). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(d) The hearing, or any medical examination conducted for the purpose of determining compensation or monetary award, shall be conducted in the English language, except that a party who does not proficiently speak or understand the English language and who requests language assistance shall be provided an interpreter. Except as provided in subdivision (k), interpreters utilized in hearings shall be certified pursuant to subdivision (e). Except as provided in subdivision (k), interpreters utilized in medical examinations shall be certified pursuant to subdivision (f). The cost of providing the interpreter shall be paid by the agency having jurisdiction over the matter if the administrative law judge or hearing officer so directs, otherwise the party for whom the interpreter is provided.

The administrative law judge's or hearing officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay, except with respect to hearings before the Workers' Compensation Appeals Board or the Division of Workers' Compensation relating to worker's compensation claims. With respect to these hearings, the payment of the costs of providing an

interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Workers' Compensation, as appropriate.

(e) The State Personnel Board which shall establish, maintain, administer, and publish annually an updated list of certified administrative hearing interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to subdivision (g). Any interpreter so listed may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures. Court interpreters certified pursuant to Section 68562, and interpreters listed on the State Personnel Board's recommended lists of court and administrative hearing interpreters prior to July 1, 1993, shall be deemed certified for purposes of this subdivision.

(f) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of certified medical examination interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to subdivision (g). Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to subdivision (e) shall be deemed certified for purposes of this subdivision.

(g) The State Personnel Board shall designate the languages for which certification shall be established under subdivisions (e) and (f). The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages. The language designations shall be based on the following:

(1) The language needs of non-English-speaking persons appearing before the administrative agencies, as determined by consultation with the agencies.

(2) The cost of developing a language examination.

(3) The availability of experts needed to develop a language examination.

(4) Other information the board deems relevant.

(h) Each certified administrative hearing interpreter and each certified medical examination interpreter shall pay a fee, due on July 1 of each year, for the renewal of his or her certification. Court interpreters certified under Section 68562 shall not pay any fees required by this section.

(i) The State Personnel Board shall establish and charge fees for applications to take interpreter examinations and for renewal of certifications. The purpose of these fees is to cover the annual projected costs of carrying out this section. The fees may be adjusted each fiscal year by a percent that is equal to or less than the percent change in the California Necessities Index prepared by the Commission on State Finance. If the amount of money collected in fees is not sufficient to cover the costs of carrying out this section, the board shall charge and be

reimbursed a pro rata share of the additional costs by the state agencies that conduct administrative hearings.

(j) The State Personnel Board may remove the names of people form the list of certified interpreters if the following conditions occur:

(1) A person on the list is deceased.

(2) A person on the list notifies the board that he or she is unavailable for work.

(3) A person on the list does not submit a renewal fee as required by subdivision (h).

(k) In the event that interpreters certified pursuant to subdivision (e) cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and utilize other interpreters. In the event that interpreters certified pursuant to subdivision (f) cannot be present at the medical examination, the physician provisionally may utilize another interpreter if that fact is noted in the record of the medical evaluation.

(l) Every state agency affected by this section shall advise each party of their right to an interpreter at the same time that each party is advised of the hearing date or medical examination. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made.

(m) The rules of confidentiality of the agency, if any, that may apply in an adjudicatory hearing, shall apply to any interpreter in the hearing, whether or not the rules so state.

(n) The interpreter shall not have had any involvement in the issues of the case prior to the hearing.

As used in subdivisions (d) and (e), the terms "administrative law judge" and "hearing officer" shall not be construed to require the use of an Office of Administrative Hearings' administrative law judge or hearing officer.

(o) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

(p) For purposes of this section "complainant" means any person claiming to have been subjected to conduct which constitutes sexual harassment, sexual assault, or sexual battery.

(q) This section becomes operative on July 1, 1995.

Comment. Subdivision (a) of former Section 11513 is superseded by Section 648.330(a) (oral evidence).

Subdivision (b) is superseded by Section 648.320 (presentation of evidence).

The first two sentences of subdivision (c) are superseded by Section 648.410 (technical rules of evidence inapplicable). The third sentence is restated in Section 648.450 (hearsay evidence and the residuum rule). The fourth sentence is superseded by Sections 648.440 (privilege) and 648.420 (discretion of presiding officer to exclude evidence). The second paragraph is restated in Section 648.470(b).

Subdivisions (d)-(n) are restated in Sections 648.240-648.285.
Subdivision (o) is restated in Section 648.470(c).
Subdivision (p) is restated in Section 648.470(a).

§ 11513.5 (repealed). Ex parte communications

11513.5. (a) Except as required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any party, including employees of the agency that filed the complaint, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, including employees of the agency that filed the complaint, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any person serving as administrative law judge, without notice and opportunity for all parties to participate in the communication.

(c) If, before serving as administrative law judge in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the content of the communication in the manner prescribed in subdivision (d).

(d) An administrative law judge who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any person desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(e) The receipt by an administrative law judge of an ex parte communication in violation of this section may provide the basis for disqualification of that administrative law judge pursuant to subdivision (c) of Section 11512. If the administrative law judge is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order by the disqualified administrative law judge.

Comment. Subdivisions (a) and (b) of former Section 11513.5 are restated in Section 648.520 (ex parte communications prohibited), omitting the limitation on communications with a person who presided at a previous stage of the proceeding. Subdivision (c) is restated in Section 648.530 (prior ex parte communication) but is limited to communications received

during the pendency of the proceeding. Subdivision (d) is restated in Section 648.540 (disclosure of ex parte communication received). Subdivision (e) is restated in Section 648.550 (disqualification of presiding officer).

§ 11514 (repealed). Affidavits

11514. (a) At any time 10 or more days prior to a hearing or a continued hearing, any part may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party).

Comment. Former Section 11514 is restated in Section 648.340 (affidavit evidence), except that the ten day period for service of notice of intent to produce affidavit evidence is changed to 30 days, and the seven day period to request cross-examination is changed to ten days.

§ 11515 (repealed). Official notice

11515. In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

Comment. Former Section 11515 is superseded by Section 648.360 (official notice).

§ 11516 (repealed). Amendment of accusation after submission of case

11516. The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment

and opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown the agency shall reopen the case to permit the introduction of additional evidence.

Comment. Former Section 11516 is superseded by Section 642.360 (amended and supplemental pleadings).

§ 11517 (repealed). Decision in contested cases

11517. (a) If a contested case is heard before an agency itself, the administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency. Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision.

(b) If a contested case is heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted a proposed decision in such form that it may be adopted as the decision in the case. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision. Thirty days after receipt of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

(c) If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same administrative law judge to take additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the case is assigned to an administrative law judge he or she shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and his or her attorney as prescribed in subdivision (b). The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

(d) The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time the agency commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or the agency refers the case to the administrative law judge to take additional evidence. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. In a case where the agency has ordered a transcript of the proceedings, the 100-day period shall

begin upon delivery of the transcript. If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(e) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

Comment. Subdivision (a) of former Section 11517 is restated in Section 643.110(d)(3) with the addition of a sentence that makes clear the agency head may make a final decision in the proceeding.

The substance of the first sentence of subdivision (b) is restated in Section 649.110(b) (proposed and final orders) and is superseded by Section 649.120 (form and contents of order). The second sentence is restated in Section 649.140 (adoption of proposed order). The third sentence is restated in Sections 613.210 (service) and 649.130 (filing of proposed decision).

The first and second sentences of subdivision (c) are restated in Section 649.240 (review procedure), except that the agency is precluded from taking additional evidence. The third and fourth sentences are restated in Section 642.860 (procedure on remand). The fifth and sixth sentences are superseded by Section 649.240 (review procedure).

The first sentence of subdivision (d) is superseded by Sections 649.150 (time proposed order becomes final) and 649.230 (initiation of review). The second sentence is restated in Section 649.110(a) (proposed and final orders). The third, fourth, and fifth sentences are restated in Section 649.230 (initiation of review).

Subdivision (e) is restated in Section 649.160 (delivery of order to parties).

§ 11518 (repealed). Decision

11518. The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

Comment. The substance of the first two sentences of former Section 11518 is restated in Section 649.120 (contents of order). The third sentence is restated in Section 649.160 (delivery of order to parties).

§ 11519 (repealed). Effective date of decision; stay of execution; notification; restitution

11519. (a) The decision shall become effective 30 days after it is delivered or mailed to respondent unless: A reconsideration is ordered within that time, or the agency itself orders that the decision shall become effective sooner, or a stay of execution is granted.

(b) A stay of execution may be included in the decision or if not included therein may be granted by the agency at any time before the decision becomes effective. The stay of execution provided herein may be accompanied by an express condition that respondent comply with specified terms of probation; provided, however, that the terms of probation shall be just and reasonable in the light of the findings and decision.

(c) If respondent was required to register with any public officer, a notification of any suspension or revocation shall be sent to such officer after the decision has become effective.

(d) As used in subdivision (b), specified terms of probation may include an order of restitution which requires the party or parties to a contract against whom the decision is rendered to compensate the other party or parties to a contract damaged as a result of a breach of contract by the party against whom the decision is rendered. In such case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of such breach. Where restitution is ordered and paid pursuant to the provisions of this subdivision, such amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

Comment. Former Section 11519 is restated in Chapter 12 (commencing with Section 650.120) (enforcement of decision) and Business and Professions Code Section 491.5.

§ 11520 (repealed). Defaults

11520. (a) If the respondent fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that he is entitled to the agency action sought, the agency may act without taking evidence.

(b) Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation.

Comment. Former Section 11520 is superseded by Section 648.130 (default).

§ 11521 (repealed). Reconsideration

11521. (a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an

administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence.

Comment. Former Section 11521 is not continued. It is superseded by Section 649.170 (correction of mistakes in order).

§ 11522 (repealed). Reinstatement of license or reduction of penalty

11522. A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition. The agency shall give notice to the Attorney General of the filing of the petition and the Attorney General and the petitioner shall be afforded an opportunity to present either oral or written argument before the agency itself. The agency itself shall decide the petition, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably deems appropriate to impose as a condition of reinstatement. This section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Comment. Former Section 11522 is restated in Business and Professions Code Section 494.5 (reinstatement of license or reduction of penalty).

§ 11523 (repealed). Judicial review

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days after a request therefor by him or her, upon the payment of the fee specified in Section 69950 as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of

the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

Note. This section has not yet been disposed of.

§ 11524 (repealed). Continuances; grant time; good cause; denial; notice review

11524. (a) The agency may grant continuances. When an administrative law judge of the Office of Administrative Hearings has been assigned to the hearing, no continuance may be granted except by him or her or by the administrative law judge in charge of the appropriate regional office of the Office of Administrative Hearings, for good cause shown.

(b) When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

(c) In the event that an application for a continuance by a party is denied by an administrative law judge of the Office of Administrative Hearings, and the party seeks judicial review thereof, the party shall, within 10 working days of the denial, make application for appropriate judicial relief in the superior court or be barred from judicial review thereof as a matter of jurisdiction. A party applying for judicial relief from the denial shall give notice to the agency and other parties. Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be either oral at the time of the denial of application for a continuance or written at the same time application is made in court for judicial relief. This subdivision does not apply to the Department of Alcoholic Beverage Control.

Comment. Former Section 11524 is superseded by Section 642.420 (continuances). Subdivision (c) is not continued.

§ 11525 (repealed). Contempt

11525. If any person in proceedings before an agency disobeys or resists any lawful order or refuses to respond to a subpena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceeding, the agency shall certify the facts to the superior court in and for the county where the proceedings are held. The court shall thereupon issue an order directing the person to appear before the court and show cause why he should not be punished as for contempt. The order and a copy of the certified statement

shall be served on the person. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed and the person charged may purge himself of the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Comment. Former Section 11525 is restated in Sections 648.610-648.630 (enforcement of orders and sanctions).

§ 11526 (repealed). Voting by mail

11526. The members of an agency qualified to vote on any question may vote by mail.

Comment. Former Section 11526 is restated in Section 613.110 (voting by agency member).

§ 11527 (repealed). Charge against funds of agency

11527. Any sums authorized to be expended under this chapter by any agency shall be a legal charge against the funds of the agency.

Comment. Section 11527 is not continued.

§ 11528 (repealed). Oaths

11528. In any proceedings under this chapter any agency, agency member, secretary of an agency, hearing reporter, or administrative law judge has power to administer oaths and affirmations and to certify to official acts.

Comment. Former Section 11528 is restated in Section 613.120 (oaths, affirmations, and certification of official acts).

§ 11529 (repealed). Interim orders

11529. (a) The administrative law judge of the Medical Quality Hearing Panel established pursuant to Section 11371 may issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health profession, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare.

(b) All orders authorized by this section shall be issued only after a hearing conducted pursuant to subdivision (d), unless it appears from the facts shown by affidavit that serious injury would result to the public before the matter can be heard on notice. Except as provided in subdivision (c), the licensee shall receive at least 15 days' prior notice of the hearing, which notice shall include affidavits and all other information in support of the order.

(c) If an interim order is issued without notice, the administrative law judge who issued the order without notice shall cause the licensee to be notified of the order, including affidavits and all other information in support of the order by a 24-hour delivery service. That notice shall also include the date of the hearing on the order, which shall be conducted in accordance with the requirement of subdivision (d), not later than 20 days from the date of issuance. The order shall be dissolved unless the requirements of subdivision (a) are satisfied.

(d) For the purposes of the hearing conducted pursuant to this section, the licentiate shall, at a minimum, have the following rights:

(1) To be represented by counsel.

(2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the record.

(3) To present written evidence in the form of relevant declarations, affidavits, and documents.

The discretion of the administrative law judge to permit testimony at the hearing conducted pursuant to this section shall be identical to the discretion of a superior court judge to permit testimony at a hearing conducted pursuant to Section 527 of the Code of Civil Procedure.

(4) To present oral argument.

(e) Consistent with the burden and standards of proof applicable to a preliminary injunction entered under Section 527 of the Code of Civil Procedure, the court shall grant the interim order where, in the exercise of its discretion, it concludes that:

(1) There is a reasonable probability that the petitioner will prevail in the underlying action.

(2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

(f) In all cases where an interim order is issued, and an accusation is not filed and served pursuant to Sections 11503 and 11505 within 15 days of the date in which the parties to the hearing on the interim order have submitted the matter, the order shall be dissolved.

Upon service of the accusation the licensee shall have, in addition to the rights granted by this section, all of the rights and privileges available as specified in this chapter. If the licensee requests a hearing on the accusation, the board shall provide the licensee with a hearing within 30 days of the request, unless the licensee stipulates to a later hearing, and a decision within 15 days of the date that matter is submitted, or the board shall nullify the interim order previously issued, unless good cause can be shown by the division for a delay.

(g) Where an interim order is issued, a written decision shall be prepared within 15 days of the hearing, by the administrative law judge, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached.

(h) Notwithstanding the fact that interim orders issued pursuant to this section are not issued after a hearing as otherwise required by this chapter, interim orders so issued shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure. The relief which may be ordered shall be limited to a stay of the interim order. Interim orders issued pursuant to this section are final interim orders and, if not dissolved pursuant to subdivision (c) or (f), may only be challenged administratively at the hearing on the accusation.

(i) The interim order provided for by this section shall be in addition to, and not a limitation on, the authority to seek injunctive relief provided for in the Business and Professions Code.

Comment. Former Section 11529 is continued in Business and Professions Code Section 494.1 without substantive change.